United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-1248

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P/S

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Appellee,

against

JOSEPH GENTILE and ERNEST LAPONZINA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

APPENDIX.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 782-6978—1975

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UNITED STATES COURT OF APPEALS
FILED
AUG 6 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

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UNITED STATES OF AMERICA,

Appellee,

against

JOSEPH GENTILE and ERNEST LAPONZINA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

----------X

DOCKET ENTRIES.

DATE	PROCEEDINGS
11-15-72	Before NEAHER, J. - Indictment filed.
12/1/72	Before ROSLING, J. - Case called- Defts GENTILE and LUCADANA and their attys present-Both defts arraigned and then enter a plea of not guilty, all motions to be made at its regular time-Bail cont'd as to both defts-Bail limits extended as to defts LUCADENA AND GENTILE to Florida- Notice for trial to be given after 12/29/72 -Deft PONZINA Not present- Bench warrant ordered.
2/1/72	Notice of Appearance filed for deft GENTILE (Atty POLAKOFF)
2/1/72	Notice of Appearance filed for deft LUCADENA (Atty AGULNICK,ETC.)
12-11-72	Bench warrant issued for deft PONZINA.
12-12-72	Notice of Motion filed for Bill of Particulars.
12/12/72	Order (by ROSLING) filed releasing bail (for deft LUCADENA).

DOCKET ENTRIES.

CRIMINAL DOCKET

DATE	PROCEEDINGS
7/6/73	Notice [illegible] for Rearguement filed.
7/6/73	Memorandum [illegible] of gov't's motion for rearguement of deft's motion for severance filed
7/11/73	Additional Discovery filed
7-30-73	Before COSTANTINO J - Case called - Oral motion to reargue severance as to deft La Ponzina - Motion submitted - Decision Reserved.
9/6/73	Notice of motion for severance filed- ret. 9/14/73 (V. LUCADANA)
9-14-73	Before Costantino J - Case called - motion for severance as to defts LUCADANA & LA PONZINA - Motion argued - Decision Reserved.
9-18-73	Before Costantino J - Case called - marked off - motion for severance disposed of on 9-17-73. (Lucadana)
9-27-73	By COSTANTINO, J. - Supplemental memorahdum and order dtd 9-25-73 filed Deft LaPonzina is severed from counts 1,2,5&6, and deft Lucadana is severed from counts 1,2,3&4. Deft LaPonzina can be tried along with def Gentile on counts 3&4 and deft Lucadana can be tried along with deft Gentile on counts 5&6. On counts 1&2 only deft Gentile can be tried.
9-28-73	Stemographer's transcript dated 9-14-73 filed.
10/1/73	Before COSTANTINO,J.- Case called and adjd to 11/19/73 for trial
10-5-73	Govts Trial Brief filed.
10/12/73	Before NEAHER,J.- Case called- Set down for all purposes on 12/17/73.
10-18-73	Notice of Motion filed , ret. Oct. 19, 1973 , as to deft LUCADANA for extension of the limits of his bail, to travel to and from the State of Florida on or about Oct. 22 to Oct.29,1973.
10/19/73	Before COSTANTINO,J.- Case called- No opposition to deft Lucadana's motion for an order granting an extention of the limits of his bail etc. and motion is granted (LUCADANA)
10-25-73	Letter of Oct. 16, 1973 filed re deft Lucadana from counsel for the deft stating that the limits are extended to include travel to and from the State of Florida on or about Oct. 22 to Oct 29, 1973.
11-19-73	Before COSTANTINO J - Case called - defts not present - adjd to Nov. 29, 1973 at 9:15 am for trial.
11-29-73	Before COSTANTINO J - Case called - adjd to 2-4-74.
12-3-73	Stenographers transcript dated Nov. 29, 1973 filed.
1-8-74	Notice of Motion filed for an order of Protection, directing a physical examination and inspection of all woretaps, etc. and an order releasing defense counsel from the provisions of a certain

DOCKET ENTRIES

72CR1232

DATE	PROCEEDINGS
-21-72	Magistrate's file 72 M 2164 inserted into CR file.
2/73	Before ROSLING, J.- Case called- No appearance on behalf of deft JOSEPH GENTILE-Deft's motion for bill of particulars, inspection and discovery granted on consent as stated by the court.
27/73	Bench Warrant retd and filed/~~Executed~~ Vacated.
27/73	Before ROSLING, J.- Case called- Deft and his atty present- Deft surrender to the govt on 3/27/73 -Deft arraigned and enters a plea of not guilty- Motions to be made at its regular time-Bail fixed $2,500.00 cash or surety Case marked ready to pass- Warrant is vacated on application of atty for the deft-Travel of deft is to include State of Fla.
-11-73	Govts Bill of Particulars and Discovery filed (Lucadana)
-11-73	Govts Bill of Particulars and Discovery filed (Gentile)
4-12-73	Magistrate's file 73 M 458 inserted into CR file.
-17-73	Notice of readiness for trial filed.
17-73	Governments bill of particulars and discovery filed.
/73	Ominbus motion in behalf of deft LA PONZINA filed. (judge has papers) and Memorandum of Law in Support of Ominibus motion filed.
10/73	Before COSTANTINO, J.- Cse called-Trial set down for 10/1/73.
10/73	Before COSTANTINO, J.- Cse called-Motion for an order directing the court to severX as to PONZINA adjd to 5/22/73
17/73	Mmmorandum in Opposition to Omhibus Motion of the Deft filed.
21-73	Stipulation filed that transcripts or copies thereof of recorded conversations in which deft LUCADANA were monitored and recorded by Agents of the Internal Revenue Service, and which transcripts have been available by the Govt to the deft., shall not be considered verbatim transcripts of such conversations but only drafts which ~~we~~ will be revised and corrected, etc. It is further stipulated that such transcript are not to be utilized or referred to in any way whatsover at the trial of this case, without the consent of the Govt
22/73	Reply Memo of Law in bhalf of deft E. LA PONZINA filed.
22/73	Before COSTANTINO, J.- Case called- Motion argued-Decision reserved.
24/73	Stipulations filed from ~~M~~ R. Shanley and Attys for the deft I. KLEIN and M. POLAKOFF, re: transcripts and recorded conversXations -Defts LA POZINA and GENTILE
21-73	Magistrate's file 73 M 776 inserted into CR file.
6/73	Supplemental Bill of Particulars filed
9/73	By COSTANTINO, J.- Memorandum and Order filed, that the defts motion to dismiss is denied and for a severance is granted. (ERNEST LA PONZINA)

DOCKET ENTRIES

DATE	PROCEEDINGS
/15/75	By COSTANTINO,J.- Memorandum and Order filed denying motion to set aside verdict (GENTILE ERNEST LaPONZINA)
5-20-74	Before COSTANTINO J - case called & sentence set down for May 30, 1975 (GENTILE & LA PONZINA)
-30-75	Before COSTANTINO J - case called -defts GENTILE & LA PONZINA present with attys - Deft GENTILE sentenced to 4 years on each of counts one to run concurrently and to pay a fine of $5,000; deft LA PONZINA sentenced to 3 years and to serve 6 months in the New York Community Center - balance of 30 months on probation pursuant to 18:3651 - Both defts stayed execution of sentence pending appeal.
5-30-75	Judgment and Commitment filed for defts GENTILE & LA PONZINA - Certified copies to Marshal.
6/6/75	Notice of appeal filed (2) (GENTILE and LaPONZINA)
6/6/75	Docket entries and duplicate of notice of appeal mailed to court of appeal
6/13/75	Copy of Order received from court of appeals and filed that record be dock on or before 6/30/75
6-18-75	Stenographers transcript filed dated May 30, 1975 -10:00 A.M.
6/27/75	Record on appeal certified and mailed to court of appeals

INDICTMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

JOSEPH GENTILE
ERNEST LA PORCINA
VINCENT LOCASCIA

Defendants

72CR1232

INDICTMENT
18 U.S.C. 201
18 U.S.C. 2
18 U.S.C. 371

NOV 15 1972

ROSLING, J

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 14th day of June, 1972 within the Eastern District of New York, the defendant JOSEPH GENTILE corruptly did, directly and indirectly offer a thing of value, that is three thousand dollars ($3,000), to Nicholas Tsotsos an employee of the United States, acting for and on behalf thereof, in an official function, under and by authority of the Internal Revenue Service, United States Treasury Department, with intent to influence the said Nicholas Tsotsos's decision and action on a question and matter then pending before him in his official capacity, and to influence the said Nicholas Tsotsos to collude in, allow and make opportunity for the commission of a fraud on the United States, and to induce the said Nicholas Tsotsos to do an act in violation of his lawful duty, all with respect to the outstanding tax liability of the defendant JOSEPH GENTILE.

(Title 18, United States Code, Section 201(b)(1), (2) and (3)

COUNT TWO

On or about the 15th day of June, 1972 within the Eastern District of New York, the defendant JOSEPH GENTILE corruptly did, directly and

indirectly, give a thing of value, that is three thousand dollars ($3000.00) to Nicholas Tsotsos, an employee of the United States, acting for and on behalf thereof, in an official function, under and by authority of the Internal Revenue Service, United States Treasury Department, with intent to influence the said Nicholas Tsotsos's decision and action on a question and matter then pending before him in his official capacity, and to influence the said Nicholas Tsotsos to collude in, allow and make opportunity for the commission of a fraud on the United States, and to induce the said Nicholas Tsotsos to do an act in violation of his lawful duty, all with respect to the outstanding tax liability of the defendant JOSEPH GENTILE.

Title 18 United States Code, Section 201 (b) (1), (2) and (3)

COUNT THREE

On or about and between the 14th day of June, 1972 and the 9th day of August 1972 both dates being approximate and inclusive, within the Eastern District of New York, the defendant ERNEST LA PONZINA and the defendant JOSEPH GENTILE corruptly did, directly and indirectly, offer and give things of value. That is free golf lessons and one thousand dollars ($1,000), to Nicholas Tsotsos, an employee of the United States, acting for and on behalf thereof, in an official functions, under and by authority of the Internal Revenue Service, United States Treasury Department, with intent to influence the said Nicholas Tsotsos's decision and action on a question and matter then pending before him in his official capacity, and to influence the said Nicholas Tsotsos to collude in, allow and make opportunity for the commission of a fraud on the United

States, and to induce the said Nicholas Tsotsos to do an act in violation of his lawful duty, all with respect to the outstanding tax liability of the defendant ERNEST LA PONZINA.

(Title 18, United States Code, Section 201(b)(1)(2) and (3)
Title 18, United States Code, Section 2)

COUNT FOUR

On or about and between the 14th day of June, 1972 and the 9th day of August, 1972 both dates being approximate and inclusive, within the Eastern District of New York, the defendant ERNEST LA PONZINA and the defendant JOSEPH GENTILE, wilfully and knowingly did combine, conspire, confederate and agree together with each other, and with deverse other persons to the Grand Jury unknown to commit the following offenses against the United States:

1. to corruptly, directly and indirectly give, things of value to an employee of the United States, acting for and on behalf thereof, in an official function, under and by authority of the Internal Revenue Service, United States Treasury Department, with intent to influence the said employee of the United States as to his decisions and actions on questions and matters then pending before him in his official capacity, and to influence the said employee of the United States to collude in, allow and make opportunity for the commission of a fraud on the United States and to induce the said employee of the United States to do acts in violation of his lawful duty, all with respect to the outstanding tax liability of the defendant ERNEST LA PONZINA, in violation of Title 18, United States Code, Section 201(b)(1), (2) and (3).

In furtherance of the conspiracy and to effect the object, thereof, the defendants performed the following

INDICTMENT

OVERT ACTS

1. On the 29th day of June 1972, within the Eastern District of New York, the defendant ERNEST LA PONZINA and the defendant JOSEPH GENTILE met Nicholas Tsotsos.

2. On the 3rd day of August 1972, within the Eastern District, the defendant JOSEPH GENTILE met with Nicholas Tsotsos.

3. On the 8th day of August 1972, within the Eastern District of New York, the defendant ERNEST LA PONZINA met with Nicholas Tsotsos.

4. On the 9th day of August 1972, within the Eastern District of New York, the defendant JOSEPH GENTILE met with Nicholas Tsotsos.

(Title 18, United States Code, Section 371)

COUNT FIVE

On or about and between the 16th day of August, 1972 and the 26th day of October, 1972, both dates being approximate and inclusive, within the Eastern District of New York, the defendant JOSEPH GENTILE and the defendant VINCENT LUCADANA corruptly did, directly and indirectly, offer and give a thing of value and aid and abet one another in offering and giving a thing of value, that is five undred dollars ($500), to Nicholas Tsotsos, an employee of the United States, acting for and on behalf thereof, in an official function, under and by authority of the Internal Revenue Service, United States Treasury Department, with intent to influence the said Nicholas Tsotsos's decision and action on a question and matter then pending before him in his official capacity, and to influence the said Nicholas Tsotsos to collude in, allow and make opportunity for the commission of a fraud on the United States, and to induce the said Nicholas Tsotsos to do an act in violation of his lawful duty, all with respect to the outstanding tax liability of the defendant VINCENT LUCADANA.

(Title 18, United States Code, Section 201(b)(1),(2) and (3)
Title 18, United States Code, Section 2)

INDICTMENT

COUNT SIX

On or about and between the 16th day of August 1972 and the 26th day of October 1972 both dates being approximate and inclusive, within the Eastern District of New York the defendant JOSEPH GENTILE and the defendant VINCENT LUCADAMA wilfully and knowingly did combine, conspire, confederate and agree together with each other, and with diverse other persons to the Grand Jury unknown to commit the following offenses against the United States:

1. to corruptly, directly and indirectly give, things of value to an employee of the United States, acting for and on behalf thereof, in an official function, under and by authority of the Internal Revenue Service, United States Treasury Department, with intent to influence the said employee of the United States as to his decision and action on questions and matters then pending before him in his official capacity, and to influence the said employee of the United States to collude in, allow and make opportunity for the commission of a fraud on the United States and to induce the said employee of the United States to do acts in violation of his lawful duties, all with respect to the outstanding tax liability of the defendant VINCENT LUCADAMA, in violation of Title 18, United States Code, Section 201(b)(1),(2) and (3).

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed the following

OVERT ACTS

1. On or about the 16th day of August 1972, within the Eastern District of New York, the defendant JOSEPH GENTILE met with Nicholas Tsotsos.

INDICTMENT

2. On or about the 24th day of August 1972, within the Eastern District of New York, the defendant JOSEPH GENTILE met with Nicholas Taetsos.

3. On or about the 17th day of October 1972, within the Eastern District of New York, the defendant VINCENT LUCADANA met with Nicholas Taetsos.

(Title 18, United States Code, Section 371)

A TRUE BILL

FOREMAN

ROBERT A. MORSE
UNITED STATES ATTORNEY

(FIRST OPENING)
OPENING - BARLOW.

recordings. As I said before, Agent Tsotsos all during this time was acting in an undercover capacity and you will hear testimony about each of the meetings that he had with the defendants, except for one perchance time that he met Mr. Gentile when he was going to dinner. He was fitted out with a body transmitter and the conversations with the defendants were recorded -- transmitted to tape recorders that were in surveillance vehicles close by the area, close by Rocket of New York and close by RAM Records and the luncheonette that Mr. Gentile and the agent went to. You will be able to have the benefit of listening to the actual words of the conversation.

The second reason I have gone into detail is this: You have heard Judge Costantino talk about a possible defense of entrapment. You are going to hear a lot of argument about people's motives, people's intent, who directed whom, who pushed the conversation that way, who pushed the conversation this way, who acted of his own violition, who was forced into something. You are going to hear much argument about that and as the triers and the judges of the facts in the case, you are going to have to decide whether Mr. Gentile and Mr. LaPonzina are innocent people who

were forced into committing a crime -- and the Judge will charge you more fully on the law -- or whether Agent Tsotsos merely provided the opportunity for somebody ready to commit a crime.

Therefore, while Agent Tsotsos is testifying and while you are listening to the tape recordings, I want you to listen very, very carefully to the words that are used, the phrasing that is being used, the inflections of the people's voices, because when you go back into the jury room you will have to use your common sense. You are going to have to decide whether Mr. Gentile in fact offered and then bribed Agent Tsotsos to fix his tax case and whether he and Mr. LaPonzina conspired together and agreed together and actually did bribe Agent Tsotsos to fix Mr. LaPonzina's tax case, and I think that if you do your job the way that you are committed to doing it, that is, if you listen and are alert and attentive to the evidence in this case, you will be able to reach a fair and just verdict. Thank you.

THE COURT: Mr. Schettino, do you wish to open?

MR. SCHETTINO: I wonder if we may have a side bar?

THE COURT: All right.

(The following took place at side bar.)

MR. SCHETTINO: If your Honor pleases, based upon the prosecutor's opening statement, I am at this time moving for the withdrawal of a juror and the declaration of a mistrial. I did not want to interrupt Mr. Barlow, but throughout his entire opening statement he made reference to the defendant Gentile's propensities -- not only propensities, he was more direct than that. He made statements to the effect that Mr. Gentile wanted to fix tax returns of other people. That is not a charge in this indictment, but it is the reference to the commission of another crime.

Now Mr. Barlow has no right at this point to anticipate what the defense will be in this case as to entrapment. Even if he intends to make that anticipation, the law is clear that until the affirmative defense has been interposed, then and only then may the prosecutor offer evidence.

THE COURT: Yes, you should not have made that statement.

MR.BARLOW: If Mr. Schettino had read the pleadings on behalf of Gentile before he got in the case, one of the preliminary motions raised the defense of entrapment. That is already in the pleadings

of the case.

THE COURT: You cannot go beyond your case and tell what the defendant does in his case, because the defendant does have the right to do nothing -- not a thing. The defendant can stand moot. You do not have a right to anticipate his defense in your opening statement. He doesn't have to put in any defense.

MR. KLEIN: Suppose he rests now and does not put any defense of entrapment in, you have a mistrial.

THE COURT: Yes, the jury has been told something.

MR. BARLOW: I do not think the defendant can have his cake and eat it too. You cannot voir dire the jury on entrapment and then --

THE COURT: You do have a right to question the jury on questions of law that may come before it. You do not have a right to anticipate what the defense will be in the case. You cannot anticipate the defense.

MR. KLEIN: Your main case is only what you are supposed to tell them.

THE COURT: Only what you intend to prove, not what you intend to defend against. It raises a problem. I do not know how serious it is. It may not be serious at all.

MR. BARLOW: In view of the objection, your Honor, I think that it might be well to read back that portion of my opening statement and see --

THE COURT: I recall your opening statement very well. You said the defendant need not do anything. I recall that.

MR. BARLOW: I think I only mentioned the word "entrapment".

THE COURT: At the end of your opening you said there will be much argument as to the defendant's propensities as to entrapment, which is a legal proposition. Before it gets to the jury, I have to go over it and see whether there is any legal basis for entrapment. When I make my ruling, then it goes before the jury. You are anticipating a legal argument to the jury prior to it being given to the jury.

MR. KLEIN: In view of the propensities shown by the transcript, he may have decided to avoid it. You brought it in now. He is either forced to go with it or sit still. If he does sit still, it is all prejudicial.

THE COURT: Let us take a five-minute recess.

(The following took place in open court.)

THE COURT: You may step out for five minutes, ladies and gentlemen.

(Recess taken.)

(After recess.)

THE COURT: Do you want to step forward, gentlemen?

First, we had better send the jury out.

Now, I have done a little bit of research. I don't know if you have done any. We have no case on point at this time. I think it is important enough that someone is going to have to brief it. We have come up with matters where statements of error made by the prosecution were capable of correction by the Court.

The only problem with the statement you made -- and I'm not passing judgment on it --

MR. BARLOW: I realize that, your Honor --

THE COURT: -- (continuing) -- is that it conflicts with the very, very founded principle of law that a defendant is presumed innocent and need not do anything during the trial and the jury should not be apprised of what a defendant may do during a trial.

It is a substantial right and I say it is a substantial right because even when we take a plea of guilty we must advise the defendant that he waives his substantial right to the presumption of innocence and confrontation of witnesses.

When you made that statement to the jury -- and

I don't think you did it with deliberateness whatsoever -- I think you felt at that time you were right in making such a statement -- but it seems to me that it is a problem that faces the Court as to whether or not this jury now would be prejudiced and again, I draw no conclusion -- in view of the fact that the defendants did not take the witness stand and, of course, they need not take the witness stand and no presumption may be raised against them, but they could be saying "What happened to the entrapment issue of the defendants?" and that creates a substantial problem from where I sit.

I don't think that can be briefed by this afternoon, but I suggest you do so by tomorrow morning at ten o'clock.

If there is a mistrial, there will be a new jury selected, but likewise, whether or not it would involve a double jeopardy situation and my opinion at this point is that it does not, but I'd like you to brief that too.

Be back at two o'clock and we will excuse the jury.

(Luncheon recess taken.)

AFTERNOON SESSION

THE COURT: Will the lawyers step up.

I have given it a lot of thought as to the problem that faced the Court this morning as to the opening statement made as to the question of the defendants having a defense of entrapment and whether or not it would prejudice the jury. And I have also given a lot of thought, without having briefs, as to the motion made for a mistrial.

The motion -- is it being made by both defendants for a mistrial?

MR. KLEIN: Mr. Schettino made the motion.

THE COURT: I want to know if you are making it too?

MR. KLEIN: May I consult with my client for a moment, your Honor?

(Pause.)

MR. KLEIN: Your Honor, I spoke to Mr. La Ponzina and we feel that the question of entrapment really affects Mr. Gentile and it is not our motion to make.

THE COURT: That's not the reason why I asked it, Mr. Klein. You know the reason I asked whether or not you join in the motion of the defendant Gentile for a mistrial, so that I have the consent of both the

defendants to select a new jury tomorrow morning.

MR. KLEIN: I do not join in the motion. I do not think it is mine to join in or not.

Normally you say you will go along with your brother attorney but Mr. La Ponzina is in a different position from Mr. Gentile.

THE COURT: Then if you do not join in the motion, you are part of the argument of the motion that the statement made by the prosecutor as to a defense of entrapment to the jury is prejudicial. You did join in the original motion.

MR. KLEIN: I participated in it.

THE COURT: Since you participated in it, the Court would have the right to assume that you were joining in the motion.

It is this Court's opinion at this time that the better way to proceed would be to select a new jury rather than go through a ten-week trial and have this as one of the issues on appeal, where that could be cured immediately.

Secondly, it cannot be cured merely by asking the jury to disregard it, since a motion has been made for a mistrial and no double jeopardy would attach, we can start with a clean slate. The jury can be selected tomorrow morning.

3 MR. SCHETTINO: So that I understand your Honor's ruling, your Honor has indicated that --

THE COURT: I am going to grant your motion.

MR. SCHETTINO: Yes, and your Honor has predetermined the question as to whether or not it is double jeopardy?

THE COURT: I have predetermined it before. So long as you make the motion, I deny your motion as to double jeopardy.

MR. SCHETTINO: Is that on the basis that the prosecutor has consented?

THE COURT: It is on the basis that you have made the motion and consented. The only one that can be placed in double jeopardy is the defendant, not the Government.

MR. KLEIN: On behalf of the defendant La Ponzina I do not join in the motion. I did not consent.

THE COURT: You discussed the motion this morning as to entrapment and I will take it as a consent that this jury should not hear the case -- an implied consent.

As long as you want to play with me, I will do it my way. It is an implied consent on your part and a motion by the defendant that there would be prejudice to both defendants, because they are both

4 involved in the same manner and on the same tapes.

MR. KLEIN: May I add for the record that my participation in the argument was in assistance of Mr. Schettino's argument and certainly not intended as a consent by Mr. La Ponzina.

THE COURT: You represent your client and you represent him for all purposes. You cannot separate the discuss on one part from another.

Do you have anything to say, Mr. Barlow?

MR. BARLOW: I can't say anything at this point. I had done some preliminary research, but I have just gotten the case cites. I know there are very few cases. I went up to the computer and there are only five cases talking about a mistrial in terms of entrapment in the opening statement.

THE COURT: There are five cases, you say?

MR. BARLOW: There were five cases as to one question that I fed into the computer. I believe it must have been entrapment or opening statement and mistrial, and of those two I think there were civil cases.

THE COURT: Do you have the citations?

MR. BARLOW: Yes.

THE COURT: Give them to my clerk. We will take a ten-minute recess.

MR. BARLOW: Then I went back a second time and there are fifteen other cases --

THE COURT: Just give me one.

MR. BARLOW: Actually the last case I found is not reported yet, except in a slip opinion. It is the Cirillo case that Judge Judd tried several months ago. I believe it was in early September or October and it is a Second Circuit opinion. That was talking about Mr. Heinemann's opening statement where I think he talked about the introduction of a tape recording as to one of the defendants and I guess that did not come in.

THE COURT: It is not similar to this.

MR. KLEIN: At this time may I respectfully move to dismiss the indictment against Mr. La Ponzina upon the grounds of double jeopardy?

THE COURT: I deny that motion.

MR. SCHETTINO: Of course, on behalf of the defendant Gentile I would make a similar motion that the indictment be dismissed as against the defendant Gentile on the grounds of double jeopardy.

THE COURT: Likewise, I deny that motion.

We will now take a fifteen-minute recess.

(Recess taken.)

THE COURT: The Court is now ready to place

upon the record his opinion as to the motions made by the defendant Gentile's attorney for a mistrial.

MR. BARLOW: Your Honor, before the Court rules the Government would ask for an adjournment until tomorrow morning so that we have the benefit of both the research on the law and the exact words that I said during my opening statement.

THE COURT: Tomorrow morning we will be selecting a new jury. The Court has a case that it is basing its opinion upon and I will follow the case.

The defendant Gentile's attorney made application to the Court after the Government had completed its opening for a mistrial. The application was made based upon the Government's assertion in the opening that there would be a defense of entrapment. The prosecutor proceeded to explain the legal implications of such a defense without objection from either the defendants' attorneys. The motion for a mistrial was made at sidebar for the withdrawal of a juror on the theory that the statements as to entrapment were prejudicial to the defendants. The attorneys for both defendants participated in the ensuing discussion and each argued the prosecutor's opening statement would be prejudicial and could not be cured by the Court issuing cautionary instructions.

Firstly, the Court is faced with the question whether there should be the withdrawal of a juror and a declaration of a mistrial and, secondly, whether there would be double jeopardy if the defendants are subject to a new trial.

Generally, double jeopardy will attach once a jury is sworn, but special circumstances allow the Court to declare a mistrial and select a new jury for a subsequent trial for the defendants. The test is "taking all the circumstances into consideration, whether there is a manifest necessity for the act or the ends of public justice would otherwise be defeated by a failure to take such action."

(United States v. Perez, 9 Wheat 579, 1824. Illinois v. Somerville, 410 U.S. 458, 1973.)

(Continued on next page.)

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THE COURT (continuing): Specifically, "A trial judge may properly exercise his discretion to declare a mistrial if an impartial verdict cannot be reached or if a verdict of conviction could be reached, but would have to be reversed on appeal due to an obvious procedural error in the trial."

(Illinois versus Somerville, 410 U.S., at Page 464.)

I find the statement made in the opening as to entrapment fully within the Somerville test. Therefore, a mistrial is declared and a jury selection for a new trial as to both defendants shall proceed on December 4th, 1974 at 10:00 a.m.

MR. KLEIN: May I please be heard?

THE COURT: You can take an exception to my opinion.

MR. KLEIN: I just want to put one thing on the record.

THE COURT: All right.

MR. KLEIN: I represent Mr. LaPonzina. There are two separate indictments here, Counts One and Two are part of the first indictment and Three and Four are as to the second. Mr. LaPonzina is only named in Count Three and Four. Mr. LaPonzina really does not have a defense of entrapment. The entrapment only

goes to Mr. Gentile in Counts One and Two. It is my duty as an officer of the Court, where I can shed some light on the subject, to volunteer. It was Mr. Schettino's motion on behalf of Mr. Gentile. I did not join in the motion. Your Honor was aware of this when your Honor asked me do I join in the motion and I said I will have to consult with my client and I came back and I informed you, "No."

Nevertheless, your Honor then said I will take it that it was -- de facto I think you said consent -- something to that effect. I assure your Honor that I couldn't have joined in any motion --

THE COURT: Take a look at the minutes.

MR. KLEIN: I will take an exception. I renew my motion to dismiss the indictment against Mr. LaPonzina.

THE COURT: Motion denied.

MR. KLEIN: On the grounds of double jeopardy.

MR. SCHETTINO: I, of course, join on behalf of the defendant Gentile and take exception to your Honor's ruling as far as your Honor's ruling concerning double jeopardy and I renew my motion.

THE COURT: Denied. I never felt so certain as I feel on this one.

MR. KLEIN: Will your Honor consider a stay for

me to go to the Court of Appeals?

THE COURT: No, tomorrow morning a new jury will be selected.

(Jury present.)

THE COURT: What the Court has to tell you may disturb you. As I told you, from time to time I am the judge of the law and it is my sworn duty to make sure that the law is followed in all circumstances, in any case that I try. I am the one that makes sure that the law is followed. In this case, unfortunately, it was not done with any intent to give you something that you were not supposed to have. There was a discussion in the opening statement made to you in reference to the defenses and if you recall at the time that I swore you in and selected you as jurors, I told you that the defendant can stand mute during the entire trial. I said the defendant is presumed to be innocent during the entire trial and that the defendant need not do anything during the trial, not even ask any questions. When the prosecutor discussed the question of defense of entrapment, that should not have been done. This Court, in the interest of justice and in the interest of a fair trial, in the event the defendants had not taken the witness stand, it may well have remained in your minds and disturbed

you as to what happened to the entrapment issue; that being so, this Court has to declare a mistrial. It declares the withdrawal of a juror. The case is now declared a mistrial. We will select a new jury. It is not your fault. You had nothing to do with it.

(Jury leaves courtroom.)

MR. KLEIN: Could you give them an instruction that they not discuss this with anyone downstairs. We will lose the entire panel.

THE COURT: Yes, call them in again.

(Jury present.)

THE COURT: Just come in for one moment. I forgot to tell you something important. You may meet some other jurors in the building. If you happen to come in when the other jurors are here, I ask you not to make any statements as to why there was a mistrial. We have to select from the same panel. Promise me that you will not discuss it whatsoever. I am really sorry that you could not have heard the entire case. I think you would have enjoyed it. Good day.

(Jury leaves courtroom.)

THE COURT: Tomorrow morning, ten o'clock. Be prepared to select a jury then.

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MR. KLEIN: Your Honor, we have two matters of importance. Yesterday you stated that the reason you denied my motion to dismiss the indictment on the grounds of double jeopardy, you felt I had participated and joined in the motion.

I have the minutes here. There is only three sentences where I said things. On page 66, we're talking about Mr. Klein.

"MR. KLEIN: Suppose he rests now and doesn't put any defense of entrapment, you have a mistrial."

I was referring to Mr. Schettino, and Mr. Gentile.

Later on, your Honor was addressing yourself to Mr. Barlow. I said something.

"MR. KLEIN: Your main case is only what you're supposed to tell them." You agreed with that.

Then on the next page, 67:

"MR. KLEIN: In view of the propensity shown by the transcript, he may have decided to avoid it. You brought it in now. He is either forced to go with it or sit still. If he does sit still, it is all prejudicial." I'm not talking about my own client; I'm talking about Mr. Gentile. I'm saying

my participation, certainly, is not a joinder in the motion.

THE COURT: I never said you joined in the motion. I said you participated in the discussion. If you read the opinion, I was very careful using the words. I wrote that myself inside to make sure the language I used is appropriate to what I was going to do. I said it specifically, that you participated in the discussion and I felt there would be no jeopardy on your part.

MR. KLEIN: I specifically did agree.

THE COURT: You can have exception to it.

MR. KLEIN: Now we come to another point.

MR. SCHETTINO: I think, Judge, we have a most serious matter that has developed this morning. I don't know whether or not your Honor reads the New York Daily News.

THE COURT: I read everything.

MR. SCHETTINO: That's why --

THE COURT: I read everything. That doesn't bother me in the least.

MR. SCHETTINO: I'd like to call to the Court's attention the article that appeared in the New York Daily News Wednesday, December 4, 1974, that if your Honor please I would like to read

of any king in history has worn. That presumption is a presumption that you have if God forbid anybody ever said "I accuse you of this." You are presumed innocent.

Mr. Gentile is innocent today and he is innocent for every minute, hour and day that you look at him in this courtroom, and he is innocent when the case is completed and he is innocent when his Honor tells you what the law is and he is innocent when you walk through that door to go into your jury room to deliberate. Only after you have deliberated and after you have discussed the facts and you have weighed the evidence, only then can you go up to Mr. Gentile and take that cloak off and only if the 12 of you are convinced beyond a reasonable doubt that Mr. Gentile is guilty. If you have any reasonable doubts, that cloak of innocent stays on Mr. Gentile.

Now, those are promises that you made to His Honor, Judge Costantino, when you were selected as jurors. It is a promise I know in my heart that you will keep to me and more importantly that you will keep with Mr. Gentile.

There is one other matter that I would like to discuss with you. Judge Costantino in his remarks to

you en masse indicated to you the intricacies of the law, that nobody expects you to become lawyers by sitting on this jury, that we as lawyers have enough difficulty with keeping up with the law, the changes and the ramifications. I am sure that most of you just by your experiences in life, your daily living, your reading of newspapers and looking at television, no doubt when someone is accused of a crime there are certain defenses to a crime, not defenses that I made up or His Honor made up. Those are defenses that the law has created. In its wisdom the law has said that if a man breaks into the sanctity of your home and threatens your life, your wife and your children, that you have a right to defend yourself. You have a right to defend your home, and if during the course of that defense the intruder is shot, wounded or killed, the law says -- depending upon the facts, that that is excusable, you were defending yourself, that was self defense.

Now, there is a defense in law that perhaps you are not familiar with and it is called "Entrapment."

Now, His HOnor is going to instruct you on the law. I don't intend to trespass on his province. That's one of the rules and principles that you must follow.

Whatever his Honor tells you about the law, whether you agree with it or not, that is the law and you must accept it.

Generally the philosophy behind entrapment is that the Government or any law enforcement agency should prevent crimes and they shouldn't busy themselves with instigating, promoting or inducing crimes. There is a lot of common sense behind that. We have enough headaches in this world, there is enough crime be committed on the streets. The law says to the Government "we have that headache, don't you create any crimes for us."

Mr. Barlow disturbed me in his opening address, because I had assumed that as I want to justice done in this case, I assumed that Mr. Barlow was heading in that same direction, but when he told you what you were going to hear on tapes, I sat and listened and I was hoping that he was going to give you the whole side of the coin and not half of it because we do not try cases that way, because if we tried them that we can all leave here at 1:00 o'clock. Mr. Barlow tells you that an agent of the INternal Revenue Service received a bribe by Mr. Gentile in order to influence the agent to fix a tax investigation that had been

going on regarding Mr. Gentile's returns. What he didn't tell you in any great detail was that this agent, who was assigned this case in June of 1971, went to Mr. Gentile September of 1971 and told Mr. Gentile the purpose of this and Mr. Gentile said to the agent "You have a job to do, do your job", and Mr. Gentile cooperated with the agent:

Who's your accountant? "Mr. Lockadano is my accountant."

There was some inquiries made about a business Mr. Gentile had, Rocket of New York.

"Who's your accountant on that? So and so.

"Where are the books and records? So and so has them."

The agent called Mr. Gentile on November 30th -- by the way, all of these conversations were taped, so that the agent questioning Mr. Gentile knew exactly what to say, why he was saying it because he knew every word was travelling through a wire back to the trunk of an automobile and into this little metal box.

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I want you to look for this when you listen to the tapes, because I feel that you all possess a lot of common sense. You look to me as people that come from various parts of the world and have varied experiences, and you're going to hear conversations like this:

"What do you mean by that, Joe?

"What does that mean, Joe?

"Why shouldn't this happen, Joe?"

You're going to hear Mr. Gentile tell this Agent, "Look, if I have done something wrong, subpoena me, take me before the Grand Jury. If you feel I did something wrong, arrest me."

Were those the words of a man that's prepared to bribe this Agent? I think you have had too much living -- all have had too much common sense. We know how bribes are created. I think if I may give you a very simple illustration:

You had an extremely bad day at the office, or your home, you were threatened that you would be fired, you were overdrawn at the bank, you are now anxious to get on the Parkway and get home to the sanctity of your wife and children, and you are speeding a little bit. All of a sudden a siren is heard, and a Police

Officer calls you aside. You know you were speeding. He says, "I have to give you a ticket. You were going sixty in a thirty mile zone." You hand him your license and registration and pull out a $50 bills, "Officer, can you forget this?" Sure, that's a bribe. We know that. That's a bribe and it is against the law, and it is wrong, but assume that the same set of facts apply, and the Police Officer pulls you over, and he comes up to your car, and he says, "You know you were speeding. I hate to do this, but I'm going to have to give you a ticket." You say, "Gee, Officer, look, I have had a bad day at the office. I am overdrawn at the bank, maybe I was speeding." And the Officer says, "Look, I can't help you that you have had a bad day, you were speeding."

You say, "Well, Officer, my wife is ill, I am running home.

"These aren't good enough reasons for me, you were speeding. Anything else you want to tell me? Any other reasons why I should write this ticket out for you?

"Well, Officer, my gas pedal was stuck.

"That's not a good explanation. That doesn't mean anything.

"Look, we have been here half an hour. I am going to have to write this ticket if you can't come

up with a better reason than that. It is getting late, anything else you want to tell me? You know, only I have to say whether or not I write this ticket out or not," and that conversation goes on and goes on and goes on.

Now, when you listen to these tapes, let me tell you this: That no matter what I tell you, and no matter what Mr. Barlow tells you, the voices are down there, they are recorded. You're going to hear them, but all I ask you, that you listen to them in their totality, because if you believe what Mr. Barlow has told you in his opening statement, we may not be here beyond Friday, so when I mention these things to you, I take the tremendous risk -- because if I am not telling the truth, if I am not leveling with you, you call me up on it because you are going to hear the voices, and you will look me straight in the eye over there, and I will know that you have called me up, because I want you to do me a favor.

You are going to be busy being attentive and listening to the evidence in this case, you are not going to be able to take notes. I do not know if his Honor will permit you in any event, and I want your full attention to this case, but I don't think I'd be disrupt-

ing your attention if I ask you to do this for me:

On your fingers, every time you hear Mr. Gentile on the tape say to this Agent, "Do your job, do it honestly, If I have done something wrong, subpoena me and take me before the Grand Jury," I want you to count because I am going to have a final opportunity to address you when the case is over, and I'd like to compare with you, Did Mr. Gentile say this to the Agent fifteen times, twenty times? How many times did he say to him, "If I did something wrong -- If I did something wrong, get me down there"?

Mr. Barlow told you that on June 14th Mr. Gentile offered to pay Agent Tsotsos the sum oif $3,000. You listen to that tape and you tell me -- You will tell me by your verdict -- but you tell me by that tape who mentioned money, who brought up the topic of money?

After there was discussion after discussion, dialogue after dialogue, the Agent says to Mr. Gentile:

"Joe, we didn't discuss money."

You tell me where on that tape Mr. Gentile says to him: "You know I want to give you some money. That's how we will take care of this."

I think, Mr. Spinner and Ladies and Gentlemen of the Jury, that if you follow his Honor's instruc-

tions, if you adhere to the law, and you listen to the tapes, I have the utmost faith and confidence that you, this jury, is going to come back with a fair and just and proper verdict.

Thank you.

THE COURT: Mr. Klein.

MR. KLEIN: Yes, your Honor.

Judge Costantino, Mr. Barlow, Mr. Schettino, Mr. Spinner and Ladies and Gentlemen of the Jury:

In a sense this is a very casual affair. It is casual for everyone's concern except my client, Mr. LaPonzina and Mr. Schettino's client, Mr. Gentile. Casual, in the sense when the case is over, you know for certain you are going home to your families, the Judge will go home to his family, the prosecutor will go home to his family, the only ones as to who there is uncertainty as to whether they go home to their families or go to prison --

MR. BARLOW: Your Honor, I have to object to that.

THE COURT: Yes, it is a bad opening. At this point, it is a bad opening.

MR. KLEIN: I beg your Honor's pardon, sir.

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summed up -- you didn't sum up, but in your opening to the jury where you told them to listen to the tapes very attentively and see whether or not your man had in fact been the one who was intending to do something wrong --

MR. SCHETTINO: If it please the Court, I maintain in connection with the Miranda warning that the Internal Revenue Service has issued a release by way of instruction to their special agents that in a criminal investigation they must and they are obliged to advise the tax payers that it is a criminal investigation, that the tax payer does not have to discuss his return with the agent, that the tax payer has the right to have an attorney present.

THE COURT: Who gets charged with anything if he fails to do it, is it the person who is being charged with the crime? Is it the man he is investigating or is it the agent who breaks the regulation?

Who gets charged with that?

MR. SCHETTINO: Well, if your Honor pleases --

THE COURT: It can't be the person being investigated because he doesn't know the regulation at that point, and the only person who is not going to tell him about the regulation is the agent, and

then it is up to his supervisor to tell him. Then what happens after that, well, all the supervisor can say is, "The next time you have a case you make sure you follow this regulation." This is no different than any administrative regulation. They have a right to make administrative regulations --

MR. SCHETTINO: Your Honor, I maintain that there is case law --

THE COURT: I understand, but I am simply putting my thoughts on the record, too.

I don't want anybody to think I sit up here having very little thought.

MR. SCHETTINO: If your Honor pleases, I don't have the citations in full, I will furnish it to the Court, but I think in the case of Lahey versus the United States --

THE COURT: May I say I went all through this interoffice business of regulations, I tried a case,

I don't recall which case, I tried a case and as a matter of fact one of the major complaints in the trial was that the agent violated his regulations in the office of the Internal Revenue Service, the defendant wanted to put the regulations into evidence and they wanted myself to take judicial notice of it, and I denied it.

Well, it went up on appeal, I know it was affirmed, if I am not mistaken, and I recall I didn't think too much of the whole situation, just sort of passed right over it, so I am on pretty firm ground on that one.

The only one that violated would be the agent, that has nothing to do with the party.

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MR. SCHETTINO: I make a point of never seriously quarrelling with a judge as long as I have my motion on the record.

THE COURT: Well, Monday is my day of quarrelling and I get it over my Friday.

MR. SCHETTINO: In addition thereto, on behalf of the defendant Gentile, I move for a mistrial, and this motion was previously made, but I renew my motion for a mistrial which was made after Mr. Barlow's opening, and I should also like to further renew my motion on behalf of the defendant Gentile that he is being subject to double jeapordy.

Now, if your Honor pleases, after you granted initially the mistrial and you instructed the impanelling of a new jury the following day, and we did that --

THE COURT: Right.

MR. SCHETTINO: -- and we are prepared to go to trial, well, Mr. Barlow did not give me until this morning the redactive tapes. I maintain that Mr. Barlow was not in a position to start this trial yesterday -- or rather on Friday when your Honor impanelled a new jury, and I respectfully move to have this trial dismissed against the defendant Gentile on the grounds that he is being subject to

double jeapordy.

Now I will stop --

THE COURT: All of those motions are denied.

MR. SCHETTINO: Thank you, your Honor.

MR. BARLOW: If your Honor pleases, may I just interject one thing in so far as Mr. Schettino's motions were based on Title 3 of Section 2510 to 2520, the wire tapping statute, I just think the record should be clear that he is precluded from arguing that now that the jury is impanelled since that section expressly says that any motions based on Title 3 shall be made before the jury is impanelled.

THE COURT: He has done that, he is merely preserving his rights as he goes along.

I know, Mr. Klein, you have something to say this morning, so you might as well get it off your chest.

MR. KLEIN: I join in the applications made by Mr. Schettino, and of course, your Honor's remarks about Mr. Gentile's loquaciousness does not apply to my client.

THE COURT: No.

MR. KLEIN: I wonder if that would have any different affect upon your ruling?

THE COURT: That will have no different affect,

that was not the reason for the conversation.

It was a question of being limited, the immateriality.

MR. KLEIN: I respectfully renew my motion for a dismissal of the indictment against the defendant La Ponzina on the grounds of double jeopardy. Over the weekend I had an opportunity to do some research, I have given your law clerk one of the cases but I haven't completed it yet, it is United States of America against Jorn, 400 US 470.

There are other cases also such as Simons, 142 US 148, Logan, 144 US 263, Thomkson, 153 US 271 -- I can't read my writing but the citation is 336 US 684.

THE COURT: Well, we have considered this in our case, we did consider it when I ordered a mistrial, and I am referring to manifestness, and I quoted it at the time, and, as I said, the test is the "taking all the circumstances into consideration, whether there is a manifestness for the act, or the ends of public justice would otherwise be defeated" by a failure to take such action, and I am here quoting Perez.

MR. KLEIN: Perez, yes, Perez.

THE COURT: I notice where the test comes from,

that is 410, I took that into consideration whereas the judge is -- whereas the judges in those cases didn't take it into consideration. I did.

MR. KLEIN: Did your Honor make a finding that there was a manifestness?

THE COURT: Yes. I find that the statement made in the opening as to entrapment falls within the Sommerville test, therefore a mistrial was declared and a new jury selected for the next trial.

I told the defendant he should proceed on December 4, 1974.

Now, it fell a little later in time, but here we are.

MR. KLEIN: Your Honor, originally I had made a motion to require the Government to elect between Counts 3 and 4 on the grounds of the same evidence test. Count 3 charges the defendant with -- the defendants with jointly aiding and abetting each other and acting in concert, and Count 4 charges them with conspiracy to do the same act, and it is exactly the same evidence and has practically the same ingredients, and this was an early pretrial motion and your Honor stated at that time that you felt it was premature, that it probably would be better procedure to permit the Government to put the evidence in and

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86 THE COURT: If you keep it up, we won't get anything.

MR. BARLOW: And finally, on page 65, of Government's Exhibit 3-B --

THE COURT: That will be reserved.

MR. BARLOW: And that was reserved by your Honor also.

MR. KLEIN: That has nothing to do with me.

THE COURT: All right.

MR. BARLOW: This of course concerns Mr. Gentile talking about a prior time when apparently two Policemen had come in and tried to shake Mr. Gentile down, and he threw them out, and then later he talked to one of the Policemen who said that the Policemen's boss had been waiting outside, and that what really had happened was, they had expected him to try and bribe them.

Of course the Government submits that that is evidence of Mr. Gentile's knowledge, really, of bribing law enforcement Officers, the fact that he knows what is going on, he is very street-wise, so to speak, and, of course, that is borne out by other conversations of his where he said that he had saved cops for many years, saved them from the Inspectors, and this is in many, or at least several, conversations.

THE COURT: I don't see anything about Policemen

in here.

MR. BARLOW: Excuse me?

THE COURT: I say I don't see anything about Policemen.

MR. SCHETTINO: Judge, can I make this comment?

THE COURT: I don't see it.

MR. SCHETTINO: Mr. Barlow tells this Court that it is important to this case, and important for this jury, because it shows that the defendant is street-wise, yet, when we get to a conversation where we want to show that Mr. Gentile takes a granddaughter to a school, that apparently is something the jury shouldn't hear. I think there is enough conversation here that the jury can draw their own conclusion that Mr. Gentile didn't go to Harvard or Yale, and that he is street-wise, but I think we compound it if in this transcription there is going to be only a one-sided basis, because if this is the Government's explanation, then I say that we have redacted what the Government has said is irrelevant where Mr. Gentile takes his granddaughter to a school, and when he contributes to charities, then I say that becomes relevant if he wants to show he is a man of the street, that we should show he walks both sides of the street, that is, if that is the Government's contention.

MR. BARLOW: The Government's position is that a

part of the conversation is much more pointed than merely being street conversation. The difference between Mr. Gentile taking his granddaughter to a school, and talking with men concerning bribes is that in the latter he is talking about a bribe situation, and that is what makes it relevant, whereas, taking his granddaughter to a school is not relevant to a bribery case.

MR. SCHETTINO: What page is this on?

MR. BARLOW: 65.

MR. SCHETTINO: What date?

MR. BARLOW: The 14th (Indicating).

Right near the end.

As a matter of fact, your Honor, even more so, he leads into it by talking to Agent Tsotsos, saying:

"The way it should be, then, your business, you are in jeopardy, if I tell you my business, I tell him my business, I become in jeopardy, here with me, like talking, I am in jeopardy from the " -- There is a blank -- "This is a number one stupid mistake."

Agent Tsotsos then says:

"If anyone discusses business over the telephone, he, you know what I mean, is crazy, is crazy."

Mr. Gentile leads into the conversation that we are talking about by saying:

"You see, this is -- This -- I don't think it's

taped now, but this was taped," then referring to the telephone.

THE COURT: All right, it will stay in.

MR. BARLOW: Thank you, your Honor.

THE COURT: I don't read it the same way you do, but it will stay in.

That is it?

MR. BARLOW: As far as the Government's case, as far as the Government is concerned, yes.

THE COURT: We will take a few minutes.

Be back in the courtroom at a quarter to 12:00

(A ten minute recess was taken.)

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may have had transactions is contacted with the subject of the investigation.

Q Do you remember when you were assigned this investigation concerning Mr. Gentile?

A Yes, it was in June of 1971. June 15.

Q Was the investigation for any particular tax years?

A The years 1968, 1969 and 1970.

Q By the way, do you recognize Mr. Gentile in the courtroom here today?

A Yes, that is Mr. Gentile sitting on the end in the green suit.

THE COURT. Indicating the defendant Gentile.

Q Now, in connection with this investigation did you have a meeting in the summer of 1971 with Joseph King?

A Yes.

Q And if you know, where was Mr. King working at the time?

A Inspector King is an inspector with the inspection services of Internal Revenue Service.

Q And as a result of that meeting what if anything did you do?

A I consented to wearing a body transmitter and to have my conversations with Mr. Gentile recorded.

Q When did you first meet Mr. Gentile?

A September 8, 1971.

Q Do you remember where you met him?

A I met him at an office that he maintained. It was previously used by Mr. Gentile in connection with a business that he participated in. It was called the Rocket of New York, but at that time it was out of business but he continued to use the office.

Q Where was the Rocket of New York?

A In Brooklyn, 560 Seventh Avenue.

Q Can you describe the neighborhood where it was located?

A Across the street was a Texaco station and behind that was a car wash and on the right side down the block was a cemetery and on the left side, on the other end of the block, the Prospect Expressway goes by.

Q Can you describe the interior of the office?

A Well, it is a basically storefront thing, a one-room office and they had a back room which was small. The office must have been about 12 by 24, I would estimate, and in the office there was a table and boxes and in back of the office was a desk and several chairs.

Q Now, what if anything did you do before you met Mr. Gentile that day, September 18, 1971?

A I went to the office of the regional inspector, 26 Federal Plaza, Manhattan.

Q What if anything was done there in your presence?

A The inspectors equipped me with a body transmitter.

Q When you met Mr. Gentile that day did you go with yourself or with someone else?

A I was accompanied by Special Agent Pater Farrell.

Q What was your purpose in going there that day?

A To interview Mr. Gentile.

Q If you remember, how did you begin the interview? What did you say and what did Mr. Gentile say?

A I identified myself to Mr. Gentile. I produced my credentials. I told him I was a special agent and there was a criminal investigation and I wanted to ask him questions but he did not have to answer my questions and anything he did say could be used against him in a criminal proceeding.

Q What if anything did Mr. Gentile say in response to that explanation?

A Mr. Gentile said he understood that and he wanted me to go ahead and ask him my questions.

Q Did you go ahead and ask him questions?

A Yes.

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Q What if anything did you do before you met Mr. Gentile on the fourteenth?

A While I was at the office of the Regional Inspector, they again equipped me with the transmitter and they also searched me, they had me take everything out of my pockets, and counted up my money and made a list of the currency, and when we got down to the parking lot, they searched my automobile.

Q After they searched your automobile, what did you do then?

A Well, we drove to the predetermined area on Third Avenue, and I think 18th Street, when the inspector turned on the tape recorder. The transmitter, the body transmitter had already been turned on in the office, had been taped on, but the tape recorder was turned on in the vicinity of the Rocket of New York.

Q By the way, Agent Tsotsos, can you stand up and just show the jury theapproximate location of where the body transmitter was?

(The witness then stood at the witness chair.)

A I wore the transmitter in the belt, there is a special belt for it, and I wore it below my -beltline, and the transmitter, which is called a Kel-transmitter, it's about that big (indicating) and about that wide (indicating), it is about that much (indicating.)

And the first -- well, at first, -- wait, in this instance, with respect to Dennis Flynn, he didn't know him.

Now, a third check which was a Guardina and Sons check made payable to the order of Sigurd Gunderson. I again showed him the check, he identified his signature, his endorsement on the back, and he said that he may know Gunderson, but later, he admitted he didn't know him.

Q Now, what did you do with the photocopies of these three checks after you left Mr. Gentile that day?

A I retained them, I kept them, I put them in my file.

MR. BARLOW: Will you mark these for identification as 20, 21 and 22?

THE CLERK: Document marked for identification as Government's Exhibit 20, another document as 21, and a third as 22.

THE COURT: Yes, sir?

MR. SCHETTINO: If your Honor please, on the question of the introduction of these checks, I don't see the relevancy. We are not trying a tax evasion case, this is --

MR. BARLOW: If we are going to have an objection, I think we ought to have it at sidebar, I would ask for a sidebar.

(The following occurred at sidebar without the hearing of the jury).

MR. BARLOW: Your Honor, I am offering these to show evidence of Mr. Gentile's state of mind, I am not really showing these or offering them for the proof of them.

The agent has already testified and it is apparent from the transcript that Mr. Gentile admitted that he had endorsed all three of these checks, and these three checks are the checks that really precipitated what the Government alleges is a bribe offer.

Your Honor may remember when the conversation continues, that there was talk of the fact that as to these three checks, the tiein doesn't look good, and is there any way we can get around this, and then a a few pages later, just a few pages later, in the transcript, there is the conversation in which Mr. Gentile says, "If there is a way around it, you tell me, yes or no."

THE COURT: I will allow them in at this time, but if there is no connection, I will strike them.

MR. SCHETTINO: Your Honor, I haven't gotten up to object on this direct examination, but I think we have gone over and beyond a trial of a bribery case, we are discussing this mans finances. This is not a

tax evasion case, because on the same theory, why not put in the man's bank statements.

THE COURT: Well, it does come in, when the bribe is being discussed, he has already related it to the bribe.

MR. SCHETTINO: Except, I respectfully submit, it becomes prejudicial. Mr. Barlow is planting in the jury's mind, that here is the man that is not reporting income, he is hiding money. What does that have to do with the bribery?

I am not going to defend him on both actions in one case. I submit that this presentation is going in.

THE COURT: I will allow this in at this point and if they are not materially connected, I will strike them.

MR. BARLOW: All right.

Thank you, your Honor.

(Continued on next page.)

* * *

And Mr. Gentile denied this other man's involvement.

And I said, "I maybe wrong about him but I am right about you."

And Mr. Gentile said, "Why do you want this satisfaction of knowing that you are right about me? Is it for your bosses' benefit or is it to satisfy your ego? Are you talking to me this way for your bosses' benefit or are you talking to me, Nick Tsotsos?"

I said, "I am talking to Nick Tsotsos."

And Mr. Gentile said, "Let me tell you of my experiences in life. I never paid cops, I never had the reputation ofpaying cops, although they say you can't do anything unless you pay cops. Well, there is no reason for me to pay cops, but if some friend who I know knows this guy, knows this guy, well, we talk a little fdifferently then. If you know what I mean. "

At this point I showed him another Gunderson check which had been cashed at the check-casher and it bore onthe back the initials "JL," which I said stood for Joe Lane, and I pointed out to Mr. Gentile that I had a Gunderson check going into his savings account, that I had another Gunderson check being deposited to Mr. Lockadano's count and was among those cashed for Mr. Gentile by Mr. Lockadano, and I had

numerous Gunderson checks being cashed at the check-casher. And I told Mr.Gentile further that the checks that he had deposited to his checking account represented business income.

And at that point Mr. Gentile said, "Well, you have a strong, strong feelings on this thing, right?"

And I said, "Right."

And Mr. Gentile said. "Well, anyway, that we can get around it."

And I said, "What do you mean?"

And Mr. Gentile said, "One way I could get around it, one way I am thinking of, "He said, "Get a hold of this Gunderson guy and find out whom he gave it to because he had to give it to a friend of mine, and I will get an affidavit from Gunderson."

And I said, "That isn't going to prove anything, that isn't a satisfactory explanation because the fact remains you end up with the money and you spend it."

Q What was his response, if any, to that?

A Well, he laughed, he said, "Yes. I up. up with the money and I spend it."

Mr. Gentile said, "Well, that is one way I was thinking of, unless you have any other?"

Q Now, did you ask Mr. Gentile anything about the

progress of your investigation.

A Well --

THE COURT: I don't understand that question, did he ask Gentile about the progress of the investigation?

MR. BARLOW: Yes, sir.

THE COURT: Well.

It is sort of a reverse question, but go ahead and answer it.

BY MR. BARLOW:

Q You may answer.

A All right.

At one point Mr. Gentile said, "When you unravel everything and you ask yourself why did he do this and why did he do that and maybe those people I loaned money to, did you ever hear them say,"'Joe is no good?' 'Joe broke my head.' Never. Well, this is the kind of guy you are talking to."

And Mr. Gentile went on to say, "But to tell you the truth when you take everything into consideration and you were to sit two people down and you were to show them this, common sense, common sense and all, I know what they are going to say, there is no excuse, they don't care what kind of guy I am or who I helped, guilty, that is what they

will say, that is the answer on these people once you show them this."

And I said to Mr. Gentile, "Well, I'm going to have to show them pretty soon, but I want to give you an opportunity to offer an explanation, I want to hear your side, I want to know what your thoughts were."

And Mr.Gentile said, "Well, what would my thoughts be? I asked you before how could I get around this, and you said, 'Well, how could you get around this?' and I told you my way. Now, what are your thoughts?

"You see, that is the answer, that really is the answer."

THE COURT: All right, we will stop right here. We will recess for luncheon until 2:15.

Don't discuss the case and keep an open mind.

MR. KLEIN: Your Honor --

THE COURT: Do you want to say something?

MR. KLEIN: Not in the presence of the Jury.

(At 1:00 o'clock the Jury left the courtroom.)

MR. KLEIN: Your Honor, may the prosecutor be instructed not to discuss this matter with the witness because he is now on the stand.

MR. BARLOW: Your Honor, that is not the law in the Second Circuit.

* * *

(The Jury then took its place in the Jurybox.)

THE COURT: All right, we are ready now.

N I C H O L A S T S O T S O S, having been previously sworn, continued to testify as follows:

CONTINUED DIRECT EXAMINATION

BY MR. BARLOW:

Q Agent Tsotsos, I believe when we ended for the luncheon recess you were talking about Mr. Gentile's conversation and you said that you should take your case to someone within the next couple of weeks.

Can you continue with that part of the conversation, please?

A Yes.

I told Mr. Gentile that before I did I wanted to give him an opportunity to offer an explanation and I wanted to hear his side and I wanted to know what his thoughts were.

And he said, "Well, what would my thoughts be. I asked you before how could I get around this and you said this, now could you get around this, and I told you my way.

"Now, what are your thoughts. You see, that is the answer, that really is the answer," he said.

And he went on to say, "Maybe it will be a dif-

ferent story if we both put our cards on the table. You open your cards with me and I will open my cards with you."

"Well" -- and I said, "What do you want me to do?"

Andhe said, "If we could get around this some way and there is a chance of getting around it some way, you tell me, you tellme just yes or no, and that is all. I don't want anyone to get hurt here in any way, I am a little older than you."

He said, "Many people got hurt, many people in a position like this, but I'll, I'll not hurt anyone, I'd as soon hurt myself because I will tell you the truth if I do anything wrong I will take my medicine."

I told Mr. Gentile that the answer to the question was yes, and he said, then, "You say it is yes?"

Then he said, "The next thing is now don't get me wrong, and there's no reflection on you because I think you would want to feel safe, and safe as I am.

"Remember that you are talking to an old-timer and I have been through the mill and I have seen a lot of people get hurt, and, believe me, I told you, before I hurt anyone, I hurt myself."

Q Now, later in the conversation did you mention anyone else to Mr. Gentile?

A Well, I said to him, "What do you want me to do?"

And he said, "You trust Frank Coppa?"

And I said, "No, I don't trust Frank Coppa."

And Mr.Gentile again told me about the time Frank Coppa had come over to his office on September 8th, 1971, after Special Agent Farrell had just left and he told Frank Coppa and another man who was Mr. Gentile's friend that they had to excuse him because two Feds were just here, and he mentioned my name and he mentioned Peter Farrell's name, and Frank Coppa said he knew me.

Mr. Gentile was relating both sides of the conversation to me.

Mr. Gentile said, "I looked at Frank and Frank looked at me, and I said, "That is Mr. Gentile said, "Oh, you know him?"

And Frank Coppa replied, "Yes I know him. but I don't think I can do anything, not that."

And Mr.Gentile replied to Frank Coppa, "Who is asking you to do anything?"

And then Mr. Gentile directed his remarks to me when he said, "I never told him to see what he could do, see what he could do for me with you, I never told him, 'Look, this is serious, tell your friend I want to meet him,'

I never told him anything like that, never."

When Mr.Gentile asked me if I knew anyone else, if there was another person that I knew very well, an accomplice or something, or a lawyer or something."

And I said, "Why can't we keep this between us?"

And Mr.Gentile said, "I don't know, I feel in my heart that I can trust you, but when you talk about putting your cards on the table, I may put the wrong card onthe table. Now I am in trouble because this friend of mine has gotten in trouble, wired, or, yes, he offered me this , here is the money, turn it in, these things have happened," Mr. Gentile said.

And I said, "Well, I am just as concerned about that as you are."

And Mr. Gentile said, "Well, that is why you are more safe with me than I am with you, and you are going to wish in your lifetime that you can meet more guys like me to do business with, and you will be in good shape, you will go home andyou will enjoy your family and you will sleep at night and everything like that."

Q In connection with this conversation, did Mr. Gentile give you any advice at this time?

A Yes, he said, "When you talk about putting your cards on the table," he said, "Nick, you are going to learn

you are going to find out in the future that you don't talk topeople like that, you just throw a hint in a little different way."

And I said, "Well, you're pretty good at it, aren't you?"

And he said, "See, never, never, never tell anyone 'put your cards on the table,' because I dont trust anyone, I don't trust anyone," Mr. Gentile said.

He went on to say, "A lot of people told me tochase you, not to talk to you, tell you to get the hell out, and I said to these people, 'I think I am capable of knowing if I should tell him that.'"

At this point I changed the subject and I told Mr. Gentile that I had a case on Ernest LaPonzina and Mr. Gentile said, "What kind of case do you have?"

And I said, "Well, in connection with the same stuff, I want to ask him some questions, can you set up a meeting?"

And Mr.Gentile said, "Do you want me there?"

And I said, "I just want to get together with him."

And Mr.Gentile said, "What do you want to do with him?"

Before I could answer he said, "You see, now

comes the guy like me, like, when, you know, I know someone, you don't say anything to him, you call me, 'Hey, Joe, this guy,' and I will tell you keep away or continue but continue, continue it my way so no matter what happens," he says, "You are always on the safe side, you are always on the safe side."

MR. KLEIN: Your Honor, may we have a limiting instruction in the sense that this does not concern Mr. LaPonzina, it is in the absence of Mr. LaPonzina.

THE COURT: No, they don't hear his name.

MR. KLEIN: All right.

THE COURT: You understand that, don't you?

(The members of the Jury indicated in the affirmative.)

THE COURT: Yes, definitely.

2 fls

(Continued on next page.)

* * *

A Yes, he said to me, "No wonder you ask me what did Frank Coppa say, and he said he can't do anything with you, that is one thing he told me.

Then Mr.Gentile went on to say, "And I kept my distance the same way you kept your distance from him, not knowing I didn't need him, and I thought someday I would need Frank, someday I would need Frank, but I didn't want to put the ball in the race, I wanted to see what you would come up with and you came up with the right thing, and if I saw I am in trouble, then I would have talked to Frank; if you didn't talk to me this way I certainly would have made it my business to talk to Frank and say, 'Frank, how good do you know this man, I want you to set up a meeting, unofficial, not official business, where he and I can meet as two people.'"

He also said, "That's what I was going to do if I left here today, if we hadn't worked things out, that iswhat I was going to do, that is the other way."

He stopped. "I was going" -- he stopped.

And I said, "Then the story about the affidavit was baloney?"

MR. Gentile said, "Right."

Can I tell you that outright? You've got to tell me being that you know whether you can trust me or not."

He went on to say, "I saved cops, I have saved

many cops from their bosses, all cops including inspectors. I have saved a lot of jobs and I don't just do it for you, I do it for everyone, and I know you don't meet too many guys like me in your lifetime."

Q Later on in the conversation what if anything did Mr.Gentile say he wanted you to do with your investigation?

A I asked Mr. Gentile, "What do you want me to do?"

And he said, "Well, what will you do for me, tell me how I can get around all of this.?"

And I said, "Criminally, civilly, or what? What do you want?"

Mr. Gentile replied, "Criminally, of course."

I said, "You want me to kill it criminally?"

And he said, "Yes, criminally, I am talking about criminally, criminally."

And I said, "Well, what about the civil taxes?"

And he said, "The civil taxes too, now all of this combined."

He said, "All of this combined, you can do something on the whole thing?"

And I said, "Yes."

And he said, "All right, that is the help that

I want, that is the help that I want and naturally whatever it is I don't want to bargain with you."

And I said, "Well, I don't want to bargain either. This is a tough thing but I think I can do it. I just want you to be reasonable with me."

Mr. Gentile said, "Well, I see the tie-up here doesn't look good. You showed me one, there is one, there is one, there is one, it doesn't look good, but I wouldn't come right out and say, 'Could you help me and I will make it worth your while.' You have to talk to me."

Then Mr. Gentile said, "You don't feel bad for helping me?"

And I said, "No."

He said, "Well then, that is it, as long as your conscience is at ease, and, remember, I told you I'd as soon as cut my arm off before I hurt anyone else let alone you."

At this point I said, "Well, we haven't talked about money yet, we haven't" --

MR. SCHETTINO: Judge, your Honor, will you instruct the agent to raise his voice?

THE COURT: Yes, raise your voice.

MR. SCHETTINO: I'm having difficulty, he goes high, low.

THE COURT: Don't volunteer. Wait until a question has been asked and if you think you've answered the question stop there and let another question be asked.

THE WITNESS: Yes, your Honor.

THE COURT: All right, okay?

THE WITNESS: Okay.

THE COURT: All right.

MR. KLEIN: I didn't hear the answer, your Honor.

THE COURT: You didn't hear what he said?

MR. KLEIN: No.

MR. SCHETTINO: I didn't hear his answer, Judge, that is why --

THE COURT: You want it repeated?

We will have it read.

(The reporter then repeated the answer.)

THE COURT: All right.

THE WITNESS: Can I continue?

THE COURT: Do you want to continue?

If you want to continue, go ahead, but keep your voice up.

DIRECT EXAMINATION

BY MR. BARLOW: (CONTINUING)

A I said, "Well, we haven't talked about money

yet."

And I said, "I'm going to let you make me an offer, but you've got to make it worth my while because I am the one who is taking the chances."

Mr. Gentile said, "It's not a question of money, I still would want to feel a little safe, and I'm trying to figure out how I am going to do it."

Q Agent Tsotsos, did Mr. Gentile mention anyone else at or about this time inthe conversation?

A Could you be a little more specific?

MR. SCHETTINO: I object to that, your Honor, the response, your Honor.

THE COURT: You can't do that.

If you don't understand the question, say, "I don't understand the question."

You can't ask him to be more specific.

MR. BARLOW: I will withdraw that question.

BY MR. BARLOW:

Q Did Mr. Gentile say anything about any other investigation?

MR. SCHETTINO: Your Honor --

A Yes.

MR. KLEIN: I will object to that as leading.

THE COURT: We are going to get past it.

You may answer that.

It is not your client, it is not your client.

MR. SCHETTINO: I dont think at this point that is relevant, he said, Did you talk about anybody else.

THE COURT: Yes, but even so.

Go ahead.

BY MR. BARLOW:

Q The question, Agent Tsotsos, was did Mr. Gentile mention anything else about any other investigation at this time?

A Yes, he asked me if I had ever done this before and I said, once before, and he said to me:

"Why did you just tell me you did it just once before?"

And I said, "Well, what difference does it make?"

And he said, "Well, I wouldn't admit it if I were you."

And I said, "Well, at this stage we have said enough to each other."

And he said, "Your answer would have been a little better if you had said, 'What difference does it make, what concern is it of yours?'"

And I said, "I have a lot to learn."

And he said, "You see, your answer would have been a little better, would have been easier and wiser for you to have answered that way."

And then he said to me a little bit further in the conversation:

"Now, you have a way out of this?"

And I said, "Yes."

He said, "Well, you have got to speak to me."

And I said, "Well, I have some reasons I can use but it will also involve suppression of some of the facts I have uncovered."

Mr. Gentile said, "All right then, you want me to make you an offer?"

3 fls

(Continued on next page.)

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Q Agent Tsotsos, going back to your answer to Mr. Gentile, had you in fact done something like this before?

A Never.

Q Now, what was your reply when Mr. Gentile -- what was your reply if any when Mr. Gentile said,-- when Mr. Gentile said, "Now, you want me to make you an offer?" What was your reply, if any?

A He said, -- I didn't reply to that, he said to me, "So you want me to make you an offer?"

And I said, "Yes."

And he said, "Well, all right. Do you have any idea what is reasonable?"

Q What did you do, what did you do at that time?

A At that point I wrote the figure $3,000 on a slip of paper that was on his desk and I pushed it over to him, and he picked it up and looked at it and he said, "Now here is what you are going to do for the criminal and the civil, right?"

And I said, "Right, but there would be a little civil tax because I had to cover myself."

And Mr. Gentile said, "No, no, no, no, no, no, that is all right, that is all right, I'm glad you are talking to me this way. Don't talk to me like you put doubts in my mind, don't make the same mistake again."

He went on to say, "I'm taking it for granted that I am dealing with the right person and as God is my judge I made the decision in my own mind."

He went on to say, "My only resolve is how I'm going to give it to you."

I said, "If you are talking about the money, why don't you just hand it to me?"

Mr. Gentile said, "If you are talking about the money, if you are talking about the money it's not the money, I'm always worried about one thing, 'am I doing business with the right person?' That is all I worry about."

He went on to say, "I'm not concerned about whether you can deliver, I'm not concerned about the money, I just don't want you to report this to anyone, I don't want anyone to know about this."

And I said, "Well, I feel the same way, too."

He said to me, "And I don't want you to get hurt. I asked you if this could be done and whether you could do it and you said yes, I asked you if you were worried about doing it, and you said no, I asked you if you had done it before andyou said yes.

"Well, of course I didn't want to hear that, and you know why I didn't want to hear that."

Then I said, "Yes, I realize you are telling

me for my own good I made a mistake."

Then Mr.Gentile said, "When do you want this?"

I said, "Well, how about tomorrow?"

He said "You want it that fast?"

I said, "Well, tomorrow if that is okay?"

And he said, "No, that is all right, and you are coming here tomorrow to ask me more questions, right?"

I said, "Right."

He said, "Okay, tomorrow at 10:00 o'clock."

He said, "I may be blowing it the way I'm giving i t to you but I am taking it upon myself that I doing business with the right person.

"Usually in cases like this it is smarter to have someone else hand it to you."

At this point he asked me if I had anyone else at my end that I had to take care of, and I said, "No, the agents who work with me don't know anything in the case, they don't know anyting about the case."

And he said, "Oh, other agents are allowed to work on your case?"

And I said, "Yes, and sometimes I work on their cases, too."

And Mr. Gentile replied, "Very interesting, very interesting."

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DIRECT EXAMINATION

BY MR. BARLOW: (Cont.)

A When I told Mr. Gentile that agents worked on my case and I worked on their cases, his reply was, "Very interesting, very interesting."

At this point we shook hands and Mr. Gentile said, "I hope this handshake is good for both of us, for a lot of years."

I said, "I hope so, too."

And before ending the conversation that day, toward the very end of the discussion, Mr. Gentile said, "By the way, I do have those checks you wanted, those cancelled checks, but I won't give them to you."

Q Now, sir, did Mr. Gentile say anything else regarding Mr. LaPonzina that day, June 14th?

A I don't recall.

Q Is there anything that would help you refresh your recollection?

A The transcript.

Q For the record, I am showing Agent Tsotsos Exhibit 3B, for identification, and specifically page 48.

Could you look at Page 48 and see if that refreshes your recollection about any other conversation regarding Mr. LaPonzina?

* * *

DIRECT EXAMINATION

BY MR. BARLOW: (Cont.)

Q Did you read all the pages --

THE COURT: What are you doing? I just stopped Mr. Klein. Are you going to do that?

MR. BARLOW: I am sorry, your Honor.

Q Do you remember anything else that Mr. Gentile said about Mr. LaPonzina that day?

A Yes.

Q Tell us what it was?

A "As far as Ernie, I will get you an appointment with him, but I am not going to tell him don't worry about it or anything like that"and then he asked me what I had on him.

He said, "You don't have anything on him like you had with me."

Q Now, after you left Rocket of New York, on that day, June 14, where did you go after you left Rocket of New York on that day?

A At a predetermined rendezvous at 39th Street between Sixth and Seventh Avenue.

Q By the way, is this where you rendezvoused after all these meetings that you are talking about?

A Yes.

* * *

in between. I must tell them what was deleted or what was in between, and as to the reason for this disjointure so that they will understand that there -- these are matters that should not be heard by them or matters that might have been inaudible at the time and they could not have heard.

MR. KLEIN: So far as Mr. Barlow's request, I have a copy and I have deleted of what he requested because it is too self serving from the Government's point of view and too much talk.

I think your Honor can do it yourself without going into that.

THE COURT: I intend to.

These are more advisory to the Court and guides rather than dictates to the Court as to what to tell the jury.

MR. KLEIN: I thought Mr. Barlow requested that they be read, those instructions.

THE COURT: No, he is asking that they be filed as the suggestion as a method to be used in instructions to the jury on deletions on the tapes or as to these abstractions, whatever you wish to call them.

MR. SCHETTINO: Your Honor, I have one other matter. I should like at this time to renew my

objection to the introduction of the three checks that the Government submitted yesterday and that your Honor admitted over my objection, and I would like to refer your Honor to the transcript of June 14, page 20, and I am quoting Agent Tsotsos now;

"Joe, we really know how you got those checks, don't we?"

Then again on the transcript of 6/14. page 22, Agent Tsotsos;

"But we know the real story, don't we Joe?"

Again, that refers to those three checks and then again on the transcript of June 14, page 23 --

THE COURT: Those statements are in, are they not?

MR. SCHETTINO: They are in the transcript.

MR. BARLOW: They have been agreed as in.

MR. SCHETTINO: If your Honor please, I have other references to the transcript. Your Honor will recall my objection to the introduction of those checks.

THE COURT: We are not trying a tax case.

MR. SCHETTINO: One, they have no relevance to a bribery case. Their sole purpose is to inflame and prejudice the jury and to put the -- to put before this jury that Mr. Gentile is involved in some

nefarious activity, that he is a bookmaker, that he is a loan shark.

I think, your Honor, that becomes more pointed when you refer to the transcript of 6/12/72 on page 27 and this is Agent Tsotsos talking: "Joe, I know you are the banker. Joe, you are the banker."

(Cont'd on next page.)

-A:tr
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And then, the transcript, as this was referred to by Agent Tsotsos, these transcripts then eventually get into a topic about -- well, who wants the satisfaction about this. I suggest that what that refers to, who wants the satisfaction, that Agent Tsotsos in effect is saying -- look, Joe, why don't you admit to me that you are a bookmaker and you are a loan shark.

I respectfully submit that these redactions were handed to me yesterday and I am not going to bore your Honor with my standing objection to all the tapes but I think now that I have reviewed the transcript which Mr. Barlow gave me yesterday, I respectfully submit to your Honor that I am trying not only a bribery case, I am defending Mr. Gentile on a bookmaking charge, I am defending Mr. Gentile --

THE COURT: Sometimes unfortunately during a trial, although we know the issues that are involved and the issue may be a narrow one, there are other matters although not relevant directly to the issue that is being tried, maybe relevant only to the extent that the case go in in the proper manner.

That is the reason I let the checks go in yesterday.

I have also stated that in the event the

checks bare they are being issued for the purpose of number 1, prejudice or number 2, rather to show he is making illegitimate money which has not been part of his income tax return on a tax case, they will not be shown to the jury.

But that I cannot decide at this point. I have reserved on that. The checks are in evidence at this point and in time I will determine whether the jury has a right to see them.

MR. SCHETTINO: I have my objection for the record.

MR. KLEIN: We have one open point we did not complete yesterday. Just before the side bar Mr. Barlow asked the witness as to whether he compared the transcript with anything and he said yes, he compared it with the original tape.

You permitted me then one question and I said, "How many original tapes were there," and he said, "There were more than one, and so I objected to it unless we knew which one it was and whether the Government was being consistent in whether it was the same tape that they permitted us to make a copy of or whether it was just a selective transcript there.

We then went to side bar for the argumen t and then from that we went into Mr. Schettino's point and

* * *

MR. KLEIN: I understood the Government's theory that was all taken care of with Mr. Gentile and so there was no need. That was a bribe offered by Mr. Gentile is disputed, of course, but why should you have to show that situation as to Mr. LaPonzina?

MR. BARLOW: That is not the Government's theory. If the Government's theory was just that it was handled by Mr. Gentile the Government would not have indicted Mr. La Ponzina. The Government alleges that Mr. La Ponzina paid directly through Mr. Gentile $1,000 to Agent Tsotsos to fix Mr. La Ponzina's tax case.

MR. KLEIN: There is no such thing in the opening, your Honor. This is something brand new that came up, that Mr. La Ponzina paid Mr. Gentile. I never heard that until this minute.

MR. BARLOW: Your Honor I read the indictment and the indictment and the indictment charges Mr. La Ponzina and Mr. Gentile with indirectly and directly offering $1,000 and free golf lessons to Agent Tsotsos and the Government's theory of the case, which it does not have to really bring out completely in the opening, but I probably did, I do not know, is that Mr. Gentile handed the money to Agent Tsotsos as

the agent, as the co-defendant and co-conspirator with Mr. La Ponzina.

MR. KLEIN: Outside the presence and without the knowledge of Mr. La Ponzina. I have a bill of particulars which says he was not even present.

MR. BARLOW: Maybe we should go to the bill of particulars because we know Mr. Shanley did not say without the knowledge of Mr. La Ponzina.

THE COURT: What is your position Mr. Schettino on this conversation?

MR. KLEIN: Are you talking to me?

THE COURT: I am addressing Mr. Schettino.

MR. SCHETTINO: Yes sir, Judge, I do not believe this particular conversation affects Mr. Gentile.

THE COURT: It does not tell us where he got the $4,000 from. I do not see anything that bad about it. It has nothing really to do with the tax case. It is the discussion as to where he got $4,000.

MR. KLEIN: Going into the tax matter.

THE COURT: Where do you see that?

MR. KLEIN: He says -- where did you get the $4,000 -- I borrowed it from him and -- if you were in debt how could you borrow from him. In other words, this would be a proper argument for the

Government if this was a tax evasion case where Mr. La Ponzina was trying to explain something about borrowing and when he claims he did not have any money -- where did you get that extra income. You see, the gist of the case against Mr. La Ponzina, the tax case, is that he indicated he had $5800 in income so he went on a net worth basis and they showed expenditures of $12,000 and they go into some of the money and he says that he borrowed.

THE COURT: What he is saying is the man did not have this money and it came from somewhere and it would go towards the bribery.

MR. KLEIN: I do not think that is what he claims.

MR. BARLOW: I am not saying that your Honor, because this $4,000 loan occurred in 1969 and the conversation is June 1972.

MR. KLEIN: It has nothing to do with it.

THE COURT: It is long before and even on remoteness it would have nothing to do with it.

MR. BARLOW: Except to show the reason, your Honor. The Government submits that it is entitled to show evidence of the defendant's state of mind at or about the time of the bribe.

THE COURT: This would be discussing a particular

* * *

MR. SCHETTINO: I am now asking for a ruling, if I call Mr. Lucadana as a defense witness for the defendant Gentile -- and I am being forthright with the Court in that he was here yesterday --

THE COURT: Since he is not a party to these proceedings, I would say he should not sit in in this trial.

MR. SCHETTINO: He should be excluded?

THE COURT: Absolutely.

MR. SCHETTINO: If I intend to call him as a witness?

THE COURT: He sits there as a spectator and a potential witness.

Of course, if you call him as a witness I will have to read him his constitutional rights. Since he would only be a witness, his constitutional rights to refrain from testifying and the basis of incrimination should be given to him.

MR. SCHETTINO: His Fifth Amendment rights.

THE COURT: He has a right to stand mute during his own trial. I will haveto tell him of his right of innocence and so forth. He will be required to have a lawyer here when you call him.

I am advising him of that now.

MR. SCHETTINO: He is in the courtroom.

THE COURT: Yes, he has listened to every word. Everyone has their ears open in the courtroom.

Do you have anything else?

MR. SCHETTINO: Nothing further.

MR. BARLOW: The Government does not have anything further.

THE COURT: You understand, Mr. Lucadana, you will haveto remove yourself from the courtroom if he intends to call you as a witness.

MR. LUCADANA: Yes.

THE COURT: You will have an absolute right to refuse to testify upon the Court giving you certain instructions.

Do you understand that?

MR. LUCADANA: Can I remain now, your Honor?

THE COURT: Not during the proceedings

(Pause.)

THE COURT: That is your motion, Mr. Barlow, as to Mr. Lucadana not being in the courtroom?

MR. BARLOW: I did it knowing Mr. Lucadana was here, but I did it for all defense witnesses.

THE COURT: You had better review it by 2:00 o'clock. I am not sure that you are right.

He is a defendant who has a right to know what people are saying about him.

MR. BARLOW: Yes, your Honor.

I would think that he would have a perfect right to read the transcript of this trial before his trial commenced.

THE COURT: It is not the same thing. I am a little bit concerned about it.

Give it some thought during lunch. I am thinking loud now, of course.

MR. BARLOW: I will make a note to research that, during lunch.

THE COURT: All right, bring the Jury in.

THE CLERK: Two articles marked for identification as Government's Exhibit 2-1 and 2-2.

(Jury present.)

THE COURT: We are about ready to start now. The Court is going to give you a charge about the tapes in this case and that's what we have been working on and that is the reason for the delay, so you do not think anything else is taking place.

The Court at this time gives you the following instructions prior to the introduction of the tape recordings in this case.

The tape recordings and transcripts of the conversations between defendants Gentile and LaPonzina with Special Agent Tsotsos are not recordings of the

* * *

A Yes, it is.

Q Can you tell us who was there, if anyone, when you got to the Rocket of New York that day?

A Mr. Gentile was there alone.

Q Do you remember where he was?

A He was standing in the middle of the office which had boxes and he was going through some cassette tapes and he had one in his hand as I walked in and we spoke briefly about those tapes.

Q After that discussion, what, if anything, did Mr. Gentile do?

A He motioned over to his desk in this manner (indicating).

MR. BARLOW: Let the record indicate that Agent Tsotsos pointed with his outstretched arm with his pointer finger extended and drew it back into a fist.

Q After Mr. Gentile did that what did you do?

A I walked over to his desk, opened his right-hand drawer and inthe left-hand corner I found the money which had been folded in half and I placed into my inside pocket.

Q Did you look up while doing that?

A Yes, and he was looking at me.

Q What did you do after you put the money into your pocket?

A I hadn't counted it. I placed it into my pocket as I said and I walked over to Mr. Gentile and we shook hands.

Q After that happened, did you have a conversation with Mr. Gentile that day?

A Yes, I told Mr. Gentile that I had a case on Ernest LaPonzina and I didn't have anything on him yet, and that I wanted to interview him.

Mr. Gentile said that he had been with Mr. LaPonzina the night before and they had discussed his -- that is Mr. LaPonzina's -- tax situation.

Mr. Gentile said that Mr. LaPonzina would not talk to me and I said, well, that's all right, what can I do? Mr. Gentile said that it would be better this way, that it would be better for Mr. LaPonzina not to talk to me and if I wanted to talk to him that Mr. LaPonzina would have me speak to his attorney and I said all right.

Mr. Gentile said otherwise it wouldn't look good. He went on to say, because I don't want to lose you on any stupid thing. He said he didn't think we should be seen together too often that it might rouse suspicions.

Q During your conversation with Mr. Gentile,

did he say anything about the checks that you had showed him the day before?

A Yes, I told Mr. Gentile that I would like to give him some advice, I told him not to handle checks anymore because they could be traced and he said yes. I realize my mistake.

He said, "By the way, those guys -- those payees of those checks, I don't know them. They were telling you the truth."

Q Do you remember how you ended the conversation that day?

A Well, I asked Mr.Gentile if I had relieved his mind and he said, "Yes, you did."

He said that, "I just want to make sure that I am doing business with the right person."

Towards the end of the conversation that day, I said, "If there is anything you need, let me know."

And Mr. Gentile said, "Well, if you want to do something with someone you think I know, come and see me and I will tell you what to do -- I will tell you right or wrong, go ahead and you will be safe."

Q After you met with Mr. Gentile that day, after you had left, where did you go?

A I rendezvoused with the inspectors again at

* * *

4 is the second tape recording that Agent Tsotsos testified to, and Government's Exhibit 4-B, now in evidence, is a transcript which he had prepared and compared to Government's Exhibit 4.

THE COURT: Mark it into evidence.

MR. KLEIN: I would object unless that represents all the recordings that were made that day.

THE COURT: Does it represent all the recordings that day, or just the transcript?

MR. BARLOW: Again, I would ask that Mr. Klein wait until the witness has testified and that evidence comes in.

MR. KLEIN: Your Honor --

MR. BARLOW: If there is going to be any further discussion, could we have a side bar?

THE COURT: Mark it into evidence.

I will be right back.

THE CLERK: Government's Exhibit 4 and 4-B, previously marked for identification, now marked in evidence.

(Recess taken.)

DIRECT EXAMINATION

BY MR. BARLOW: (continued)

Q Agent Tsotsos, the first time that you met the defendant Ernest LaPonzina, when was that?

A June 29, 1972.

Q And if you remember, can you tell us how that meeting came about?

A I had telephoned Mr. Gentile on June 27, and I asked him if he would give me Mr. LaPonzina's telephone number so I could call him myself and make my own appointment, and Mr. Gentile said, "I can't remember Mr. LaPonzina's telephone number, but I will make the appointment for you."

I said, "How about this afternoon?"

He said, "No, Mr. LaPonzina and I have to go somewhere together," and we made it for the 29th in the morning.

Notes fl

(continued on next page.)

* * *

A To the Rocket of New York.

Q Can you tell us who was there, if anyone, when you got to the Rocket of New York?

A Mr. Gentile and Mr. LaPonzina.

Q Now, can you tell us what you talked about initially?

A Well, I told Mr. LaPonzina that I was conducting an investigation -- criminal tax investigation of his 1969, 1970 tax years and I asked him who had prepared his returns and what information he submitted in connection with that --

Q By the way, did he indicate who prepared his returns?

A Yes, he said Mr. Vincent Lucadana.

Q Continue.

A I asked Mr. LaPonzina questions regarding his personal history, his employment, banks, brokerage accounts, real estate, loans and I asked him also to explain if he could the difference between what he reported and what his expenditures were, which at that time --

Q By the way, had you taken anything with you that day?

A I had taken his original tax returns for the years 1969 and 1970.

Q Do you remember anymore specifically what you asked Mr. LaPonzina about his employment?

A Well, his return indicated that he was self-employed --

MR. KLEIN: I will object to that. That is rank hearsay. The returns are the best evidence.

THE COURT: Yes, that is hearsay.

Q Without telling us what was on the tax return of Mr. LaPonzina, what did you ask him about?

A I asked him about his employment with Town House Furniture Company.

Q What, if anything, did he reply?

A He said he didn't know what I was talking about. Then he asked me whose return is that and I showed it to him again and he identified his signature.

Q What, if anything, did Mr. Gentile say to that?

MR. KLEIN: I will object to anything dealing with Mr. LaPonzina's tax return.

This is not a tax case.

THE COURT: This has nothing to do with a tax case.

MR. BARLOW: Your Honor, could we have a short side bar for a second?

(Side bar.)

THE COURT: You think there is any future?

MR. KLEIN: No, sir.

MR. BARLOW: Your Honor, I would agree with Mr. Klein that we are not trying a tax case here, however, again a necessary element of this proof is that theGovernment has to show and has the right, therefore, to show what official duties and the performance of those duties it alleges were corrupted by the bribe that Mr. LaPonzina gave through Mr. Gentile.

If there is no evidence of why they were meeting, then the jury only gets the evidence that money passed and they have no indication as to why.

If the Government -- the Government is going to present prejudicial evidence about a tax evasion case and the Court's charge will make it clear that the jury is not to consider any evidence about other crimes, but when the Government has to prove that something is corrupted, the Government has the right to show what that something is and in fact it is set out in the indictment and in the Bill of Particulars concerning the tax --

THE COURT: There is nothing to show at this

point that he had anything to do with his tax case in the first place.

You can't go about throwing issues into the case that are not there.

MR. BARLOW: The evidence is already in that the tax case of Mr. LaPonzina was assigned to Mr. Tsotsos.

MR. KLEIN: He said that he had nothing on him.

MR. BARLOW: He said that he had a case and there was nothing on him.

THE COURT: That's the thing I am thinking of, too. That's the reason for my ruling.

You can't make something corrupt out of nothing.

(Open Court.)

DIRECT EXAMINATION

BY MR. BARLOW: (Cont.)

Q Agent Tsotsos, while you were asking these questions of Mr. LaPonzina, what, if anything else, were you doing?

A I was taking notes.

Q What did Mr. Laponzina say, if anything, about that?

A Well, at one point --

MR. KLEIN: If this deals with the tax case and I will object to what he did -- not only what

he is quoting but what he did.

THE COURT: I will sustain it likewise.

BY MR. BARLOW:

Q How long did you talk to Mr. Gentile and Mr. LaPonzina that day?

A About two hours.

Q When did you next meet -- excuse me, during this conversation, did you arrange with Mr. Gentile or Mr. LaPonzina for any further meetings?

A No.

Q When is the next time you met Mr. Gentile?

A August 3rd, 1972.

Q And can you tell us how that meeting came about?

A I had telephoned him that I wanted to get together with him. I asked him if we could meet that morning and he said okay, but I was detained and I called him back -- we were supposed to meet at the Rocket of New York.

I was detained and I called him at the Rocket of New York and told him that I would be late and he said that he couldn't wait for me that I should meet him at Ram Records, which he had told me was a business venture that he was involved in.

Q Before you went to Ram Records, what, if anything,

* * *

and in the back they do the wholesale operation.

Mr. Gentile took me around the store and took me into the back where they had this machine that wrapped record albums -- wrapped those albums in celophane and he showed me how the machine worked.

Q Did you stay at Ram Records or did you go someplace else?

A From there we went to a coffee shop about a block and a half up or down the street from Ram Records.

Q By "we", who are you referring to?

A Mr. Gentile and myself.

Q Did you have a conversation with Mr. Gentile there?

A Yes, in the coffee shop.

Q Can you tell us how the conversation began?

A I told Mr. Gentile that I had good news for him; he said "Good news doesn't hurt anyone, then I want to talk to you about Ernie."

And I said, "Well, what are Ernie's intentions"?

MR. Gentile said, "I spoke to Ernie and I asked him what he wanted to do and he asked me what I thought he should do. Now, I am asking you what do you have on this guy? You don't have checks like you had with me. His lawyer tells him that everything is in order, but I says to Ernie

'Look, I don't like this thing, we don't need it.'"

Mr. Gentile went on to say that I had said that they were partners. He said, "Well, you said we were partners, well, we are good friends. Naturally, whatever I can do for him I will, if it's within my power."

Mr. Gentile went on to say that when Mr. Laponzina's lawyer tells Mr. Laponzina there is nothing to worry about Mr. Gentile said, "I don't go by lawyers. Lawyers and accountants talk a good game with their mouths. I don't go by them. When his lawyer tells him not to worry about something, I don't go by it. Now, I am asking you what is it?"

Q What was your reply?

A Before I explained the situation regarding my investigation of Mr. LaPonzina, I told Mr. Gentile that his case had gone through and that he should be getting a bill from the Service Center shortly.

Q By his case, are you referring to Mr. Gentile's or Mr. Laponzina's case?

A Mr. Gentile's case.

Q Had this in fact happened?

A No. They I said, "What are Ernie's intentions?"

Q Did Mr. Gentile respond in any way?

A Yes, he said, "When you do business with one guy, just stick to one guy."

I went on to tell him the situation regarding my investigation of Mr. LaPonzina -- I outlined what my investigation had uncovered up until that point and Mr. Gentile confirmed much of what I had said.

Then he offered me some advice. He said, "Don't tell anyone your business." He said that, "Even if you committed something, no matter how much your back is against the wall, never, never incriminate yourself."

Then he went on to say that he could have done it differently with me, he could have told me, go ahead, do your job.

He said that he could have told me that because he knew he could have gotten out of it, that it would have cost him a little money but he could have gotten out of it.

He said that there were certain people that he could get ot, who would make me look like a puppet. He said he knew that my power was limited, that my superiors could stop me short, as in the previous investigation.

He said that the agent was onhim for tow years and he said, "I couldn't do anything with him," and Mr. Gentile said, "and I ended up paying just a little tax."

Q Excuse me, go ahead.

A May I continue?

Q Go ahead.

A He made reference again to Frank Coppa and he said, "I never told him to see what you could do for me." He said, "I thought maybe he would tell me something, neither did he tell me anything, and that," he says, "is the God's honest truth.

"He did say what he did say about you, 'I know Nick is a fair guy and he doesn't look for something that is not there.'"

Following this part of the conversation Mr. Gentile said, "~~Now, as far as with Ernie, I told him~~ that if I could help the situation, I would, but if I tell him then who is he going to tell? Sooner or later word will get around, we got you in our pocket."

And I said to Mr. Gentile, "That would be bad," and he told me about a chief inspector -- police chief inspector he said that would do anything for him -- Mr. Gentile said, "This chief inspector would do anything for me, he would stand right out in front of my place to watch, protect it, he would do anything for me."

He told me about the time an investigator came to Mr. Gentile inquiring as to whether or not Mr. Gentile paid cops and Mr. Gentile said -- referring to the chief inspector -- "I cursed him and I told the investigator to

excuse me about talking about the chief inspector that way," he said, "because he speaks to me bad."

Then Mr. Gentile said,this is what I tell them, now this chief inspector gets a pat on the shoulder, and one day the chief inspector came to see Mr. Gentile and he said, "Gee, what did you tell them?"

Gentile said, "Tell them, I protect you, fella," and Mr. Gentile told me, "We get along for years, not one day, one months, but for seven years but this chief inspector never got into trouble."

Mr. Gentile went on to tell me, "See, if you play the game right, you wouldn't get into trouble -- you have to play the game right. Never tell anyone your business, not your wife, not your brother, not your sister." He said that he learned this over the years. He said that he had been burned many times, excuse me, he said that he had been hurt many times.

Then getting on to Mr. LaPonzina, Mr. Gentile said, "I will give you something there, but without him and I will just tell him I took care of it."

I said, "I don't think that is right," and Mr. Gentile said --

MR. KLEIN: If your Honor please, this is not binding upon Mr. LaPonzina.

THE COURT: Definitely not binding upon Mr. LaPonzina.

What somebody else says about someone that does not bind someone unless they are there to acquiesce or acknowledge it. That's what we call hearsay.

A (Continuing) Mr. Gentile said "These are things that you would have understood, why do you care unless you are ---satisfied."

I said,"I don't want any misunderstanding."

Mr. Gentile said,"I could tell Ernie, Nick is okay, you can trust him, Mr. LaPonzina would say: Yeah, I would be glad to talk to him."

But Mr. Gentile said, "I don't want him to, because the fewer people that know your business the better off you are."

I said, "I don't feel right about it."

MR. Gentile said, "Well, do youwant to sit down with him then?"

And I said, "Yes."

He said, "All right, here is what I am willing to do, up to a thousand dollars, I figure Ernie's case is worth a thousand dollars," and he said, "here are your alternatives: You can sit down and work things out with

or with me, either way."

I said,"I'd rather sit down with Mr. LaPonzina."

Mr. Gentile said, "Well, he won't talk to you, he won't talk to you the way I do, but I don't want him to fence," and I said,"Well, I just want him to tell me what he wants to do, I want Mr. LaPonzina to tell me what he wants to do and what he wants me to do."

Mr. Gentile said, "Well, I will give him an idean and then you two can work it out."

And I said, "Fine."

Q Now, did you have any further discussion concerning a meeting with Mr. LaPonzina?

A Yes, we had made an appointment for me to meet Mr. LaPonzina August 8th at the Rocket of New York at 10:00 o'clock.

Q Did Mr. Gentile mention anyone else that day?

A Yes, he said, "What other cases are you working on?"

I mentioned three cases, it was the third one -- I mentioned Johnny Otto, that Mr. Gentile said, "Could you do something there? He is a close friend of mine,"and I said, "It's possible."

Mr. Gentile said that he would talk to Johnny Otto or Johnny BathBeach as Mr. Gentile referred to him. He

would speak to Johnny Otto's people, but he said, "You won't meet him though."

I said, "Well, as long as you could tell me what he wants and if you could show me athe money as not coming from your pocket, I may consider it on that basis."

And Mr. Gentile said, "Now, I know why you want to meet Ernie --" he said, "The thousand dollars is not coming from my pocket."

Q After you had this meeting with Mr. Gentile, to where did you go from that luncheonette?

A I rendezvoused with the inspectors again and we went back to 26 Federal Plaza.

Q Did there come a time when you listened to a tape recording of that conversation?

A Yes.

Q What did you do in connection with listening to that tape recording?

A I prepared a transcript.

Q I am showing you Exhibits 6B and 6E, for identification, could you tell us whether you can identify those?

A Yes, this is the transcript that I prepared.

Q Is that transcript, Government's Exhibit 6B, a

* * *

THE COURT: Are we ready?

MR. BARLOW: The Government is ready, your Honor.

MR. SCHETTINO: The defendant is ready. However, before you call in the jury I have a motion. I know your Honor's morning would not be complete if I did not.

THE COURT: You might as well make it complete.

MR. SCHETTINO: If your Honor please at this time and on behalf of the defendant, Joseph Gentile, I respectfully move for the dismissal of the indictment on the grounds that the prosecutor in this case has persisted, despite the fact we commenced the case a week ago and because Of Mr. Barlow's opening statement to the jury it occasioned my motion for a mistrial which your Honor granted. The basis for that mistrial was that Mr. Barlow had in his opening statement to the jury inferred or introduced statements to the effect that Mr. Gentile had either endeavored to fix other people's tax returns. That he had in the past dealt with cops and other law enforcement people, the inference being he was dealing with them in the field or line of bribery.

Now, although in my opening to the jury I mentioned to them the defense of entrapment I

respectfully submit that Mr. Barlow again in his case in chief has introduced into evidence matters pertaining to the question of pre-disposition.

In effect what he has done to my client, he has violated his Fifth Amendment rights. I am in a position now where I am faced with a conviction if I do not put Mr. Gentile on the stand. Mr. Barlow has Mr. Tsotsos testimony to the fact Mr. Gentile on one occasion mentioned a man by the name of Oddo in connection with his tax return. Mr. Tsotsos has testified in the direct case that Mr. Gentile mentioned some police inspector he had on the payroll.

I respectfully submit that Mr. Barlow has once again introduced testimony concerning the question of pre-disposition and the defense has not entered its case yet.

He has effectively locked me into the defense of entrapment and I respectfully submit, the mere fact that is a matter I mentioned in my opening, I certainly, in defending a man's liberty, should have the right to reserve my options as to how I am going to conduct his defense.

My motion, if your Honor please, is not by way of mistrial because I think at this point this amounts to prosecutorial misconduct because we had a dry run

on this before. This would be a matter in which I would think that Mr. Barlow would exercise extreme caution so that we would not be trampling on this delicate ground.

I think the seriousness of my motion is that it cries out that Mr. Gentile now has to take the stand. I cannot leave this matter the way Mr. Barlow has left it. I cannot leave this hang with the jury that Mr. Gentile is looking for Mr. Oddo's return, he is looking to fix this gentleman's return, and I might further say to your Honor that another grievous and serious error here is, and I think I would be substantiated, if your Honor looks at the transcript, Mr. Oddo's name is mentioned by Mr. Tsotsos not by Mr. Gentile. That occurs -- I do not know whether it is on June 12 or June 14, but Mr. Gentile says to Mr. Tsotsos: "Are you working on anybody else's return," and Mr. Tsotsos mentions Mr. Oddo and he mentions two or three other people.

I respectfully submit that I am in a position now that I am locked in. Mr. Barlow has very securely locked me in and I have no option in this case at all. I certainly do not have the option of denying the bribe. I do not have other defenses that were contemplated here. I have one defense only now, entrapment, and I

must put Mr. Gentile on the stand.

THE COURT: That is how you started out, with one defense, entrapment, and the presumption of innocence.

MR. SCHETTINO: Except, Judge, unless I do not understand the law --

THE COURT: That makes two of us.

MR. SCHETTINO: As I understand the law, entrapment is an affirmative defense so the defense is only in the case once I affirmatively present it to the Court and once I have done that, if I again understand the law, the Government then has the burden beyond a reasonable doubt to show the defendant's pre-disposition to have made the bribe and if they do that out goes my defense of entrapment.

THE COURT: At the time of the openings I gave you the option of either opening immediately after the Government had made its opening or waiting until the close of the Government's case to make your opening, and you made the choice of making your opening right after the Government made theirs.

MR. SCHETTINO: I am not quite sure I follow the logic of that statement.

THE COURT: Defendant immediately after the Government's opening had the option to make its opening

or wait until the Government put its case in and then make its opening after that.

MR. SCHETTINO: I am aware, your Honor, of that procedural mechanism.

THE COURT: At the time of your opening you told them you had a defense. It is no longer the prosecutor saying you have a defense of entrapment, it is saying you have a defense of entrapment. You have placed your man in a position where he now has to come forward, if that is what you say he has to do, unless the Government fails in its proof so miserably beyond the essentials that are necessary. You have to come forward because you placed that defense in evidence before the jury in your opening.

MR. SCHETTINO: I do not dispute, your Honor, that in my opening I went into, in some detail, the question of entrapment with the jury. I do not know that I am following the rationale of how that permits the Government --

THE COURT: It does not permit them to anticipate what you are going to do. It does permit them to try their case as they see fit.

MR. BARLOW: Your Honor, may I briefly reply? I know the Court knows the law as to this and I am pretty sure Mr. Schettino does. It is normal book law that

evidence if permissible under one ground is admissible even though it may not be under another ground. It is true if there is a defense of entrapment raised that much of the evidence of Mr. Gentile's prior dealings with cops and the Chief Inspector would go toward entrapment. But in addition to that, and a necessary ingredient and essential of the Government's case in chief is that it must prove that Mr. Gentile and in the case of Mr. La Ponzina, both Mr. La Ponzina and Mr. Gentile corruptly offered and/or gave bribes to agent Tsotsos and the Government submits that Mr. Gentile's admissions mainly on June 14, when he offered the bribe, and later to some extent on June 15 and August 3, also go to the state of mind at the exact time that he was offering and giving the bribe to Agent Tsotsos.

Of course, it is also true that within the Court's discretion the Government has a right to offer proof of prior and subsequent similar acts to show amongst other things intent and the Government submits that the evidence of Mr. Gentile's admissions during these conversations are admissible under that theory as well as under a theory of entrapment.

MR. SCHETTINO: I respectfully submit, Judge, then either I do not know the theory of affirmative

defenses or Mr. Barlow is now teaching me new law. I have always been under the impression ever since I graduated from law school that an affirmative defense is one that the defendant selects. He chooses his defenses and on an affirmative defense the defendant has the burden to put it in and in all affirmative defenses the law affords the people, the Government, opportunities to rebut it. But I do not know of any theory of law where the rebuttal comes first and then an affirmative action comes later.

THE COURT: I do not think that is happening here. This is strictly on the prime case that is being offered. It has nothing to do with rebutting an affirmative defense of entrapment. It is a little different from an affirmative defense which must be pleaded by the defendant in order to be given to the Government. It is not that type of defense. It goes to the weight of the evidence as to whether it was entrapment or not rather than pleading of such affirmative defense.

MR. SCHETTINO: If your Honor has denied my motion I then again renew the motion I made initially regarding the reference to John Oddo and several other people that have a certain amount of notoriety and that are known by some of the public.

I respectfully submit that the mention of those names is prejudicial, it is inflammatory. I further renew the motion I made regarding the reference in the tapes to the fact that Mr. Gentile or that Mr. Tsotsos says Mr. Gentile is a banker. The reason, if your Honor please, that I renewed these objections now, your Honor's instructions were very clear yesterday, that as the tapes are being listened to, that if I have an objection I should raise my hand and we would have a sidebar. I think I then replied to your Honor and it certainly was not done in a facetious manner, that my hand would be more in an up position than a down position.

I feel this is going to be a disruption to the jury and I do not think it will put my defendant in a good light. What I would like to now place on the record is my standing objection to the tapes in their entirety and I do not know whether or not that conflicts in any fashion with your Honor's instructions that I did not weigh my objection, that I could make them during the trial.

(Continued on next page.)

THE COURT: You have a standing objection to the tape.

MR. BARLOW: Just two small points. What Mr. Schettino said has reminded me of something. As to the names mentioned, the transcript and the testimony will bear out that Agent Tsotsos referred to Mr. Oddo as John Oddo. It was Mr. Gentile who referred to Mr. Oddo as Johnny Bathbeach. Also, with respect to objections to the tape recordings while they are being played, as I understand it, those portions that the Court has ruled on are either in or out, since objections have been made and the Court has ruled on them.

As to the other portions, it was stipulated prior to trial and agreed between counsel that some portions were to come in and some portions would stay out. If the defense has the right to object to those portions which they have stipulated to and I am doing that with the understanding that Mr. Schettino now has a standing objection to all the tapes and he also --

THE COURT: He had that from the very beginning. What he is trying to do is not waive his consent to it.

MR. BARLOW: He also now has a standing objection to all the redactions so he is having his cake and eating it, too. What I am saying, if the defense has

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over to his car.

Q What did you do then, sir?

A I walked up the block and I got into the car next to him.

Q Did Mr. La Ponzina indicate to you why he was there that day?

A Yes. He said: "Joe said you wanted to see me."

MR. SCHETTINO: If your Honor please, I am sure your Honor will instruct the jury any reference to Mr. Gentile in a conversation he is not present is not binding on him.

THE COURT: It is not binding.

Q What was your reply, if any?

A I said, "I wanted to know, Ernie, what your intentions were," and he said, "Whatever you and Joe spoke about, no problem."

I said, "Well, I am not sure what you mean," and he gestured by rubbing his thumb and forefinger together in this way (indicating).

MR. BARLOW: Let the record indicate Agent Tsotsos is doing that with his right hand.

MR. KLEIN: Let the record indicate Agent Tsotsos has been using hand gestures throughout his entire testimony for the last few days throughout his

entire testimony.

THE WITNESS: After he gestured in this manner I said, "Well, what do you want me to do, discontinue the investigation?"

He said, "Yes," and I said, "Write the case off?"

And Mr. La Ponzina nodded in the affirmative. And I said, that is why I wanted to see you because I did not want any misunderstanding. I felt that if you wanted to do something you would make your own deal."

Mr. La Ponzina said, "What do I know about it, Nick? It is all right."

And then he whispered that Mr. Gentile would give me the money and I said, "As long as there are no misunderstandings about that and as long as you are satisfied I am willing to go along with you guys."

MR. BARLOW: If your Honor please, at this time could we have a short sidebar?

THE COURT: All right.

(Sidebar discussion.)

MR. BARLOW: Your Honor, the Court has been quite proper up to this time in instructing the jury that hearsay of one defendant is not admissible against the other. However, I think with Agent Tsotsos testimony that Mr. La Ponzina has indicated that he talked to

* * *

other people in the investigation, "That you come to me." All that evidence was asked because Mr. Klein objected yesterday.

Now Mr. Klein is pulling himself up by his bootstraps saying because he objected the Government does not have evidence about the tax investigation. I do not think he can have it both ways.

MR. KLEIN: I objected and the Judge upheld my objection and precluded you from putting it in.

THE COURT: I want to look at the essentials of the conspiracy. We will take a five-minute recess.

(End of sidebar discussion.)

THE COURT: You will have to take a short recess.

(The jury left the courtroom and there was a ten-minute recess.)

THE COURT: As to the motion made by the defendant La Ponzina, the Court makes the following ruling.

"That the testimony is admissible in view of the fact that it is based on non-hearsay testimony made by Mr. La Ponzina directly to the agent and the Court finds there is a preponderance of evidence as far as a conspiracy is concerned and that is what I must find at this time.

Secondly, the issue in the case whether there

was intent to commit bribery and, number two, whether bribery was offered, those issues offered in the tax matter will not be offered to the jury on the basis of the tax case but rather goes toward the intent of bribery and not for tax purposes.

That is the Court's ruling.

MR. BARLOW: Your Honor, I have one other thing just to make the record clear.

THE COURT: Based upon non-hearsay evidence, I am talking about.

MR. BARLOW: For all of the tape recordings and transcript collectively, Government's Exhibits 1 through 8 for Identification, what the Government will proffer of the originals are the numerals by itself. The complete transcript is A and the retracted transcript that the Government will proffer to the jury is E in each case. I just wanted the record to reflect -- I am sorry -- A to B is the transcript to be offered to the jury, A-1, 2, 3, 4, 5, 6, 7, 8.

E is the copy of the tape Agent Tsotsos listened to. I want the record to reflect there is no C and there is no D for those. It was inadvertantly omitted. I do not know why I did not put in A "C". I state this so the Court will know there is no C and D.

THE COURT: All right, bring in the jury.

You have an exception to my ruling.

(The jury entered the witness box.)

THE COURT: We are ready to start again.

BY MR. BARLOW:

Q Now, Agent Tsotsos, again referring to August 8, 1972, what if anything else did Mr. La Ponzina say about Mr. Gentile?

A Well, Mr. La Ponzina said that he was not partners with someone else I had mentioned to Mr. Gentile on August 3rd. He denied being partners with that other individual. Then he said: "Now, as far as saying I am partners with Joe, I am good friends with Joe but I won't lie to you. If he tells me something I am willing to go in with him."

Q Were there any other topics discussed during that conversation that day?

A Yes, we talked about golf.

Q And can you remember what was said?

A Mr. La Ponzina asked me if I played golf and I told him --

MR. KLEIN: Your Honor, can we have a sidebar at this time? This is a new subject.

THE COURT: All right.

(Sidebar discussion.)

MR. KLEIN: At this time I am going to ask the Government for an offer of proof because the most I can make out of this golf is that it is a gratuity. If there was a bribe, if you believe this witness' testimony about the one thousand dollars, then there would be no need for him to offer golf lessons.

THE COURT: Is that supposed to be a crime?

MR. BARLOW: I did not indict, your Honor.

THE COURT: I know. I am asking you a question.

MR. BARLOW: The fact is that the golf testimony will be that Mr. La Ponzina did offer a half a dozen free golf lessons at Marty Korman's drive-in.

MR. KLEIN: For what purpose?

MR. BARLOW: To Agent Tsotsos.

THE COURT: To bribe him or have him learn golf?

MR. KLEIN: It would be a gratuity at most.

MR. BARLOW: I think the offer or this occurrence was several minutes after he talks about having Mr. Gentile give $1,000 the next day. I think it is all one parcel. Obviously, the Government did not put in a separate count.

THE COURT: I will have to decide whether it has any value in this case whatsoever.

(End of sidebar.)

THE COURT: We will take a short recess again.

(The jury left the courtroom.)

THE COURT: We'll take this portion of the testimony as an offer of proof to determine whether or not it should be in the case as far as bribery is concerned.

BY MR. BARLOW:

Q Mr. Tsotsos, can you tell us what your conversation was concerning golf lessons?

A He asked me if I played golf. I said I did at one time but I gave it up because I wasn't doing too good at it. He said, "Did you get lessons?"

And I said, "No, that is what I need."

He said, "Do you want some lessons?"

And I said I could use them. He said that he could get me free golf lessons from a friend of his, Martin Korman, who had a driving range in Brooklyn.

Q And did he indicate how many golf lessons?

A He said that a half a dozen lessons would straighten me out.

Q Did Mr. La Ponzina indicate or tell you what if anything he would do in connection with these golf lessons?

A He said he would speak to Marty Korman and he said he would give me a card.

Q And did he give you a card?

A Yes.

Q I show you Government's Exhibit 24 that has been marked for Identification and can you tell us whether you can identify it?

A Yes, this is the card.

Q And how can you identify it?

A Well, I recognize it. He had taken this card from Mr. Gentile's desk and I watched him as he wrote on it.

THE COURT: He took the card from Mr. Gentile's desk?

THE WITNESS: Yes. We had gone into the Rocket of New York at this point and he wrote the card out.

THE COURT: Did you go in before you discussed the golf lessons or after you discussed it?

THE WITNESS: After.

Q Just to make it clear, what was the purpose in getting out of the car and going to the Rocket of New York at that time?

A Mr. La Ponzina was going to telephone Mr. Gentile.

Q And did he try to telephone Mr. Gentile?

A Yes.

Q Was he able to reach him on the telephone that

day?

A No.

THE COURT: Did he telephone with reference to to the golf lessons? Was he going to telephone Mr. Gentile with reference to the golf lessons?

THE WITNESS: No. He was going --

THE COURT: I do not want to know. The answer is no.

Then he took this card off Mr. Gentile's desk?

THE WITNESS: Yes.

Q Actually, how many cards did he give you that day?

A He gave me two cards.

THE COURT: Now you have my curiosity -- what was the other card?

MR. KLEIN: As to the second card, I am going to object. That deals with Florida.

MR. BARLOW: I do not intend to introduce this in evidence but just for purposes outside the presence of the jury.

THE COURT: Is this about the Florida golf? All right, forget about it.

(Continued on next page.)

* * *

Judge, until I looked at the card. And again --

THE COURT: Just the back will be photostated and the back will go into evidence. Not the front.

MR. BARLOW: I have no objection to that.

THE COURT: O.K. In other words, he wrote on a business card -- your testimony is that he wrote on a business card; that is his writing; is that right?

THE WITNESS: Yes.

THE COURT: I will have to allow that card in.

All right, the offer --

MR. KLEIN: I understood the only time this witness was in there -- he was in there in the office alone by himself.

THE COURT: That may be for you to determine on cross-examination.

MR. KLEIN: All right.

THE COURT: The Court is not going to anticipate what your questions are going to be.

MR. KLEIN: All right.

THE COURT: You want to attack his credibility, his veracity, that's for you to do on cross-examination. That is not the Court's province. We want to keep the record straight.

MR. BARLOW: Again, just to keep the record

straight, the Government will have marked for Identification as Government's 26 --

THE COURT: Is that on the House of Flowers card?

MR. BARLOW: Yes.

THE COURT: Lanes House of Flowers, or whatever it is.

THE CLERK: 25.

MR. BARLOW: It's the second 125.

THE CLERK: The cash is 25.

MR. BARLOW: So this will be 26.

THE CLERK: Right.

Document marked for Identification as Government Exhibit 26.

THE COURT: Can I ask you one question? Just prio to the conversation involving the golf lesson, what was the statement that was made? just prior to it? If you can recall.

THE WITNESS: Well, we were talking about golfing and country clubs. And then he asked -- that is, Mr. La Ponzina --

THE COURT: Was that just part of a general type of conversation you were having?

THE WITNESS: No. It did relate to the

investigation.

THE COURT: Golf and country club related to the investigation?

THE WITNESS: Well, he is a member of a golf club. And I don't recall --

THE COURT: Nothing wrong with that?

THE WITNESS: No.

THE COURT: There are many things wrong in life, but being a member of a golf club, there's nothing wrong with that? You wouldn't be that jaundiced if a man says, "I'm a country club member." You wouldn't be that jaundiced about that? That didn't create any problem for you if the man said he belonged to a country club?

THE WITNESS: Do you mean was it significant?

THE COURT: Yes. Was it significant to you that he belonged to a country club?

THE WITNESS: At this point it wasn't, but usually in investigations, something like that is significant.

MR. BARLOW: I think one question I have might clear that up.

Q Agent Tsotsos, in connection with a tax investigation of Mr. La Ponzina, would expenditures for country

club membership and things purchased at the country club, would that be relevant to your investigation?

THE COURT: He answered that.

THE WITNESS: Yes.

THE COURT: He's a tax agent, not me.

MR. KLEIN: How much was the membership in that golf club?

THE WITNESS: It was a nominal fee.

MR. KLEIN: $15 or $20 a year?

THE WITNESS: I think that's what it was.

THE COURT: If you checked it and if it was $15 a year, would it affect -- would it be an important item on the income tax return? Would you get very excited about that? You might get more excited on a charitable contribution to a church.

THE WITNESS: I didn't know what the membership was at that time.

THE COURT: All right. I asked the question for my own edification.

O.K.

Q Again, just for purposes of this hearing and setting the record straight, can you identify Government Exhibit 26 for Identification?

A Yes. This is the card.

Q Just briefly, what did Mr. La Ponzina say in connection with this card?

MR. KLEIN: That is objected to because it's already been ruled on. That's the Florida --

THE COURT: That's Florida.

MR. BARLOW: I want the record to be clear that this then came to La Ponzina's nephew in Florida.

THE WITNESS: That's right.

THE COURT: Which you never utilized.

THE WITNESS: That's correct.

THE COURT: Neither here nor there. O.K.

All right, bring in the jury.

MR. KLEIN: One question: Did you ever utilize the golf lesson over here in Bay Parkway, Marty Korman?

THE WITNESS: I did not.

THE COURT: All right. Bring in the jury.

You may ask the questions.

(Whereupon, the jury entered the courtroom.)

BY MR. BARLOW:

Q Now, Agent Tsotsos, I think you said that you and Mr. La Ponzina discussed golf. Will you tell us what that conversation was.

A Mr. La Ponzina asked me if I played golf. And I said I did at one time but I gave it up because I wasn't too

good at it.

And he said, "Did you get any lessons?"

And I said, "That's what I need."

He said, "Do you want some lessons?"

And I said, "I could use them."

And he said, "I could arrange for you to have some free golf lessons from a friend of mine, Martin Korman, who owns a driving range in Brooklyn."

Q Did Mr. La Ponzina indicate how many lessons?

A He said that a half dozen lessons would straighten me out.

Q Did Mr. La Ponzina indicate what if anything he might do in connection with that?

A He said he would speak to Marty Korman.

Q Now, did you ask Mr. La Ponzina anything about Mr. Gentile that day?

A Yes. I said, "What should I do? Should I call Joe now or what?"

Mr. La Ponzina said, "Well, you can meet with him tomorrow."

And then he said, "Mr. Gentile also has something else he wants to talk to you about."

Q After that conversation, what if anything did you do?

* * *

THE COURT: No, I will deny your motion.

In any event, the only portion of that card, which he should state should be the back of it, nothing else.

Q In any event --

THE COURT: Just disregard it. Completely disregard what he just said.

Q In any event, all Mr. La Ponzina did with the card was to write on the back of the card, right?

A Yes. And give it to me.

Q Is this his writing on the back?

A Yes, it is.

MR. BARLOW: Your Honor, with that redaction, the Government offers into evidence Government Exhibit 24 for Identification.

MR. KLEIN: I think the --

THE COURT: Just the back.

MR. BARLOW: Yes.

THE COURT: They will not see it at this time.

THE CLERK: Government Exhibit 24 previously marked for Identification marked in Evidence as indicated by the Court.

Q Now, during this conversation with Mr. La Ponzina, Agent Tsotsos, did you say anything about your future?

A Yes. I told Mr. La Ponzina that I didn't expect to work for the Internal Revenue Service much longer, that I was going on the outside and practice accounting.

Q What if anything did Mr. La Ponzina reply?

A He said that he could get me a lot of clients.

MR. KLEIN: Again, I am going to ask for the withdrawal of a juror here because this is not part of a bribery case where we are throwing extraneous matters in.

MR. BARLOW: I would ask that Mr. Klein reserve his arguments out of the presence of the jury.

THE COURT: I will deny the motion, but I don't think the testimony should come in.

MR. KLEIN: And please instruct the jury to disregard it.

THE COURT: Disregard it.

Q Now, Agent Tsotsos, do you remember what happened at the very end of the conversation?

A Yes. I asked Mr. La Ponzina to again see if he could reach Mr. Gentile.

THE COURT: May I make a statement at this point.

You may have a problem because there are two defendants' attorneys here who try their cases in the

Federal and State Courts. And I come from the State Court. And in the State Court the attorney is entitled to give up and state his reason in front of the jury as a matter of law as to what he believes the law to be. But objections made in a Federal Court, you don't do that. You go to the sidebar and you make your objection in private as to questions of law that may be involved.

So that I really can't take him to task because we are in both courts.

All right.

Q Was Mr. La Ponzina able to reach Mr. Gentile the second time?

A No.

Q What if anything was discussed then about a meeting with Mr. Gentile?

A Well, we made it final that I would meet Mr. Gentile the following morning at 10 o'clock.

Q What did you do after you left the Rocket of New York that day?

A I rendezvoused with the inspectors at 39th Street between Sixth and Seventh Avenue.

Q From there where did you go?

A After they had turned off my transmitter an the

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THE COURT: Page 13 is physically removed.

Q Now, the next date, Agent Tsotsos, August 9th, '72, did you go to the Rocket of New York?

A Yes.

Q Will you tell us what, if anything, you did before you went there?

A Again, I went to the office of the Regional Inspector. They equipped me with a radio transmitter. I emptied my pockets. They counted the money that I had in my possession, and they recorded the denominations of the currency and serials, and listed the coinage. And then they searched my automobile in the parking lot.

Q If you know, when was the transmitter turned on?

A It was turned on at that time.

Q After the Inspector had searched your car, where did you go?

A We rendesvoused at the predetermined point in the vicinity of the Rocket of New York, where the Inspectors turned on my tape recorder in the trunk of my car.

Q From the rendesvous, did you then go to the Rocket of New York?

A Yes, I did.

Q Who was there, if anyone, when you got to the

Rocket of New York that day?

A Mr. Gentile was there. He was standing at the back of his office, behind his desk.

Q Did you have any conversation with him that day?

A Yes.

Q Can you tell us what happened then?

A Mr. Gentile said, "I hope you are satisfied with your meeting."

And I said, "Well, I just wanted to satisfy myself that this is what Ernie wants to do, and that everything was all right."

Mr. Gentile said, "Yeah."

And he then handed me the money, which I took and put in the inside pocket of my jacket.

And I said, "Okay, Joe. Ernie mentioned that you wanted to talk to me about someone else."

Mr. Gentile said, "Of those names that you mentioned on August 3rd, there is only one guy that I am interested in."

Q And what, if anything, did Mr. Gentile say he would do in connection with that person?

A Mr. Gentile was referring to --

MR. SCHETTINO: I object. This is not responsive to the question.

THE COURT: Sustained. It is not responsive.

Q Without mentioning the name, will you tell us what Mr. Gentile would do in connection with that person?

A He said he would talk to his people and he would find out what the situation was, and he would let me know.

Q Do you remember about how long that conversation was that day?

A It wasn't very long.

Q After the conversation, what, if anything, did you do?

A I again met with the Inspectors at 39th Street between Sixth and Seventh Avenue.

They turned off my radio transmitter, and turned off the tape recorder in my trunk.

Inspector King got into the car, and we drove to his office. That is, the office of the Regional Inspector at 26 Federal Plaza.

Q Did he accompany you the whole way to his office?

A Yes, he did.

Q Can you tell us what you did when you got to Mr. King's office?

A I gave Inspector King the money that Mr. Gentile had given to me.

Q And what else did you do, if anything?

A Well, together we counted. And I initialed and

* * *

THE COURT: Bring in the jury.

(The jury entered the jury box.)

THE COURT: All right, Mr. Schettino. We are now going to start cross-examination.

MR. KLEIN: Your Honor --

THE COURT: Yes, I meant to do that, I will place it on the record on the side.

(The following occurred at sidebar.)

THE COURT: All right, as to the motion made to give a limiting instruction with respect to the money, the $1,000 that has been marked in Evidence, that is not binding upon the defendant La Ponzina, and the Court will deny the motion at this time in view of the fact that if the jury should find that the money was given in furtherance of the conspiracy it would be admissible as against Mr. La Ponzina, so it becomes a question of fact.

MR. BARLOW: Thank you, thank you, your Honor.

MR. KLEIN: That is why I ask for the limiting instruction.

THE COURT: I will give them full instructions at the proper time.

MR. KLEIN: Your Honor, every time I ask for a limiting instruction your Honor has granted it, even on the $3,000 --

THE COURT: I will tell them it is a question of fact.

MR. KLEIN: Yes, that it is to be considered as against Mr. La Ponzina if the jury finds he was a member of the conspiracy.

THE COURT: Consistent with all the other instructions I will give them the law on conspiracy at the end of the case.

(In open court.)

THE COURT: All right, there was a motion made by the defendant La Ponzina through Mr. Klein, his attorney, you will recall, as to giving you a limiting instruction with reference to the money that was marked in evidence, the $1,000, the ten one hundred dollar bills, and the Court at this time tells you it is a question of fact. At the proper time the Court will give you your full charge on the law on conspiracy, that is as to whether or not the monies that were offered in evidence were in furtherance of that conspiracy so that it would bind Mr. La Ponzina.

All right.

MR. SCHETTINO: May I proceed?

THE COURT: Yes.

(Continued on next page.)

* * *

A Yes, I do.

Q Now, Mr. Tsotsos, you told us that you were assigned tax matters concerning Joseph Gentile, I believe, on June 15, of 1971?

A Yes.

Q Am I correct on that date?

A Yes, you are.

Q Now, when you say you were assigned the tax matters concerning Mr. Gentile on that date, does someone in particular assign a matter to you?

A Yes.

Q And who in this instance assigned Mr. Gentile's matter to you?

A The Assistant Chief of the Intelligence Division.

Q Now, when you got such an assignment, and particularly as you did in this case from your Assistant Chief, does he give you a file with background information?

A I get a case assignment card.

Q Well, will you tell us what a case assignment card is.

A Well, the case assignment card authorizes the investigation.

Q Did they give you anything else in connection with the card?

A Well, sometimes they do, yes.

* * *

Q Now, you have told us, Mr. Tsotsos, that the first time you met with Mr. Gentile in connection with this matter, I believe it was September 8th or -- in 1971; is that correct?

A Yes, sir.

Q Now, from June 15, 1971, the date of your assignment, to and including September 8th, your first meeting with Mr. Gentile, were you out gathering information pertinent to your investigation?

A I never made any third party inquiries, if that is what you mean. 3 mos. gathered no tax info

Q Well, did you go to any of the banks that Mr. Gentile was doing business with?

A No, the only thing I had done with to interview the Revenue Agent who made the referral to the Intelligence Division.

Q And that is all you did from June 15th to and including September 8th of '71?

A Well, I had several meetings with the Revenue Agent who referred the fraud matter to Intelligence which initiated the fraud investigation, incidentally, and that card that I had mentioned, and I interviewed another Revenue Agent who was examining Vincent Lucadana, and I had a discussion with Inspector King, my Group Supervisor, and Inspector King's Super-

visor at the time.

Q Now, after having had those discussions with the people that you have mentioned, did you or anybody in the office either call Mr. Gentile or write him a letter to tell him that he was under investigation?

A Between June 15th and September 8th?

Q Yes.

A No.

Q So that when you first visited Mr. Gentile on September 8, 1971, you and no one in the Internal Revenue Service had sent him any notification, you hadn't called him, or you hadn't written to him to tell him that his tax returns were under investigation; is that right?

A That is right.

Q Now, on September 8th -- I withdraw that.

You told us, Mr. Tsotsos, on direct examination, that as a result of your conversations with Mr. King, that you consented to be bugged in connection with this particular investigation; is that correct?

A I consented to wear a radio transmitter and have my conversations with Mr. Gentile recorded.

Q In common parlance, that contraption is referred to as a bug, is it not?

A I think there is another expression for it.

Q Is it better than mine?

A I don't know.

Q Now, Mr. Tsotsos, you said that you consented to wear this body recorder --

A Transmitter.

Q Transmitter.

Is your consent required?

A Yes, sir.

Q In other words, did Mr. King say to you that in this particular investigation he wanted you to wear this body transmitter, and did you have the right to tell him no?

A This was his request, it was part of my duties --

Q I appreciate that.

A (continuing) -- as a Special Agent, I didn't have the right to say no.

Q So that you -- When you say you consented, you are saying that in a literal sense, your written consent to wear this transmitter was not required, was it?

A No.

Q Now, before visiting Mr. Gentile on September 8th of '71, you went into the Federal Plaza, did you not, to have this transmitter put on your body?

A Yes, sir.

Q And I believe you told us on the first visit you

* * *

this first visit?

A I think I know what you are asking, he did give --

Q I am not asking for a conversation.

A He did give me some instructions.

Q Now, on September 8, Mr. Tsotsos, did you have any documents with you such as checks, bank statements, property deeds?

A On September 8th?

Q Yes.

A No.

Q Now, you have described to us that this body transmitter that was affixed to your box on September 8th as a metal box, and I think you told us somewhere, I am not -- I don't know if I am accurate, but it was two inches by four inches?

A A little bigger than a pack of cigarettes.

Q And I think you said it is taped somewhere just above your groin?

A To the right side of my abdomen.

Q So that when you go into Federal Plaza, do you have to undress so they can attach this?

A Yes, I have to pull my pants down.

Q You have to strip down to bare before they can put this box on your body; isn't that right?

* * *

A No.

Q Did you ever try it?

A No.

Q Now, on September 8, '71, did they do anything else in Federal Plaza other than fixing this bellyband with the transmitter in the pocket?

A Mr. King gave me some instructions as to -- well, for example, he said, Don't stand next to an air conditioner, and Don't stand near a radio, because it would interfere with the transmission.

Q But they didn't search you on September 8, 1971, did they?

A No.

Q And they didn't search your car on September 8, 1971, did they?

A No.

Q And I assume, likewise, they didn't search Agent Farrell on September 8, '71?

A No, not in my presence.

Q Am I correct, Mr. Tsotsos, in saying that it was only on the meeting of September 8, 1971, that you had a fellow Agent with you when interviewing Mr. Gentile?

A Yes, that is right.

Q At no other meeting subsequently did you go to

* * *

Q Now, in proceeding from Manhattan to this storefront office, did you know whether or not Mr. Gentile was going to be in at that time and on that day?

A No.

Q When you arrived at the Rocket of New York, you found Mr. Gentile in; did you not?

A Yes.

Q And you engaged Mr. Gentile in a conversation regarding the tax matter you were investigating; is that correct, sir?

A Yes.

Q And that conversation, I think you told us, took approximately 4 hours; right?

A Right.

Q And that conversation was tape recorded, was it not?

A Yes.

Q Now, Mr. Tsotsos; you told us what your procedure had been in connection with the tape recordings; that is, that a time would come when you would listen to the tape recording and then you would then prepare a transcript; is that correct?

A I didn't catch the first part of your question.

Q Well, you told us that your procedure in

connection with these tape recordings, was to listen to them and then prepare a transcript of what you had heard.

A Yes.

Q Did you make a transcript of your 4 hour conversation of September 8. 1971?

A No.

Q For the purpose of testifying in this case, did you review and listen to the tape recording of the conversation of September 8, 1971?

A Part of it, yes.

Q Now, if I told you that on that date and during that four hour conversation you said to Mr. Gentile, "Joe, we will give you a fair shake if we can"; would that help you recall any part of that conversation?

A I don't remember that.

Q If I suggested to you that at that 4 hour meeting between you and Agent Farrell and Mr. Gentile, that Mr. Gentile said to you, Look, if I've done something wrong, do your job, I don't want to hide anything from you, you have got a job to do and do your job," would that help you recall that conversation?

A I really don't remember whether he said it on September 8th, but he has said something to that effect to me, either then or subsequently. I do remember him telling

me that at one time.

Q Well, the fact is, Mr. Tsotsos, that Mr. Gentile told you that on 15 or 20 occasions, didn't he?

A He told me several times.

Q Now, if I further suggested to you that on the meeting of September 8, 1971, Mr. Gentile told you who his accountant was --

A Yes.

Q -- and that Mr. Gentile told you about his business interests in the carwash and who the accountant was in that connection; and that in addition to that, Mr. Gentile told you that he had a checking account at the Manufacturers Hanover; that he had a mortgage with, I believe, the Hamilton Federal; and that he had a savings account in the Brooklyn Savings Bank, if I told you that that is a part of the conversation of September 8, '71, would that help refresh your recollection about that conversation?

A Are you asking me if I know for a fact that he said these things to me and that we, we talked about these things on that particular day?

Q Yes.

A I don't remember for certain.

Q You remember Mr. Gentile -- I will withdraw

that.

Do you remember on that day asking Mr. Gentile for records, business records in connection with the carwash, and do you remember Mr. Gentile telling you the accountant has got them, and even gave you the name of the accountant; do you remember that?

A Mr. Schettino, I can only assume that he said these things to me --

THE COURT: No, he is asking you a direct question and answer it either you do remember or you don't remember, you can't assume anything.

A I don't remember specifically , I have never listened to the whole tape.

Q The tape of September 8, 1971, the 4 hour conversation?

A That is right.

Q Was it at Mr. Barlow's instructions that you didn't listen to the whole tape?

A No, it was that we just felt there was nothing significant.

Q Well, when you said . "we felt," you mean you and Mr. Barlow; is that correct?

A Yes, that is right.

Q Now, as I understand it, Mr. Tsotsos, the

next meeting you had with Mr. Gentile was on September 23, 1971; is that correct?

A Yes.

Q And for the sake of brevity, you have already testified to it, before each meeting, you went to New York and they put a bug on you, put it in the "on" position, and then you went on your way; is that correct?

A Yes.

Q And you did that on September 23rd?

A Yes.

Q Did you go with anybody on September 23rd to see Mr. Gentile?

A No.

Q You went by yourself?

A That is right.

Q With, of course, the transmitter?

A Yes.

Q And where did that conversation on September 23rd take place?

A The Rocket of New York.

Q Approximately how long did that conversation last?

A About two hours.

Q Now again, following the procedure that you

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Q So that other than your recollection regarding the conversation that took place three years ago, we don't have a tape recording and we don't have a transcript, do we, Mr. Tsotsos?

A Basically, that's true

Q If I suggested to you on September 23rd, 1971, that Mr. Gentile said to you, "Look, get off my back. If I have done something wrong, investigate me, take me to the Grand Jury and indict me."

Would that refresh your recollection?

A No.

Q Would you say that he didn't say it?

A I don't know.

Q Now, by the way, Mr. Tsotsos, when you went into New York on September 23rd and they attached the transmitter, did they search you on that day?

A No.

Q Did they search your car on that date?

A No.

Q Isn't it a fact, Mr. Tsotsos, that the first time they searched you was on June 12th?

A That's right.

Q Withdraw that -- June 14th?

A No. June 12th.

* * *

A Yes.

Q But on November 30th, you drove into New York in order to make a phone call to Mr. Gentile; is that correct?

A That's right.

Q And with your consent they attached a bug to the phone, didn't they?

A They attached a recording device, yes.

Q Now, from whose office was that phone call made?

A From the office of the regional inspector.

Q Is that Mr. King?

You're smiling. I hope I have promoted him. He deserves it.

A I think he would like to be.

No. From his office inside the -- what is termed the office of the regional inspector. There are several offices.

Q Now,who was present when you made this phone call besides yourself and Mr. King?

A There were other inspectors in the room.

Q They were in the same room where the telephone was located?

A Which telephone are you talking about?

Q The telephone instrument from which you called Mr. GEntile, the phone that was bugged.

A No. I called from the supervisor's office which is inside the office. There is -- the supervisor's office has walls and it has an enclosed area and it's inside the group office.

And I telephoned from inside the supervisor's office. And they attached the recording device to the extension phone which was outside the supervisor's office.

Q Now, this recording device that they attached to the telephone, could a third party in the room hear the conversation coming out from the tape recorder?

A I don't know.

Q Now, who was present in that room, this enclosure that you were in besides yourself making the phone call? Who else was in the room ?

A I was by myself.

Q Mr. King wasn't there?

A No. He was outside the enclosure. This enclosed sill is about 4 feet up. It's metal. And then from that point to the ceiling, it's glass.

Q Who had asked you to make the phone call to Mr. Gentile?

A I don't remember.

* * *

A Yes.

Q It wasn't Mr. GEntile's home, was it?

A I don't remember.

Q Did you tell Mr. GEntile -- withdraw that.

You dialed the phone. Did you get Mr. Gentile on the other end?

A Yes.

Q Did you tell Mr. Gentile that his conversation was being bugged?

A No.

Q Did you have any form of a mechanical beeping on the wire?

A No.

Q In fact, Mr. Tsotsos, Mr. Gentile said to you during that 45 minute conversation, "Hey, you got a bug there. You got a tape recorder."

And do you remember what you said?

A I didn't say anything.

Q If I suggest to you that you said, "No, there is no tape recorder," would that help refresh your recollection?

A I didn't say that.

Q You reviewed the tapes and you reviewed the transcripts of the conversation of November 30th?

A Yes.

Q Do you remember in that phone conversation your impressing Mrs. Gentile with the fact that you were advising him of his rights, and do you remember saying, "You know, Joe, I know you get very mad when I tell you, you have got certain rights."

Do you remember Mr. Gentile saying, "I know. What do you want, a tape recorder there?"

And do you remember saying, "No, I just want you to understand something."

If I suggested to you that that is on the tape and on the transcript, would it help refresh your recollection?

A I like to look at the transcript, if I may.

MR. SCHETTINO: Is the transcript in evidence, your Honor?

THE COURT: I think they are all --

MR. SCHETTINO: I will be glad to show him.

MR. BARLOW: Yes. This will be transcript 1B.

THE COURT :They are all in evidence.

MR. SCHETTINO: If the Court has no objection, I will show him my copy.

THE COURT: Surely.

MR. SCHETTINO: I got it from Mr. Barlow, so I have to assume it's accurate.

THE COURT: All right.

Q Does that help refresh your recollection?

A I said, No. But I wasn't responding to his question.

THE COURT: No. You see, you can't qualify. He asked you a question as to a statement made by transcription. You can only answer the question he is asking you. You cannot qualify a question. You are a witness; you are not a litigant; do you understand that?

THE WITNESS: Yes.

THE COURT: All right.

Now, we are going to recess for lunch. It will be about 2 o'clock. We hope to make it. We are moving along. We are getting there now, I think.

All right, step down.

(Witness excused.)

(Whereupon, the jury retired from the courtroom.)

(Luncheon recess taken.)

* * *

listening to that, make a transcription of that conversation?

A Yes, sir.

Q And in preparing yourself to testify at this trial, did you listen to that tape recording and did you read the transcript thereafter?

A Yes, sir.

Q Now, based upon the manner in which you refreshed your recollection in connection with that phone call, do you remember Mr. Gentile saying to you:

"Now, I say if somebody does something wrong, do your job. I'm not against that. Now if I did something wrong, you do your job."

Do you remember Mr. Gentile saying that to you on that telephone call?

A Yes, sir.

Q In fact, during that 45 minute telephone conversation, on at least a half dozen occasions, he said to you, "Do your job, if I have done something wrong here, do your job, investigate me."

Isn't that so?

A He said it several times, yes.

Q And he said to you, did he not, "Mr. Tsotsos, you do the job and satisfy yourself and satisfy your people."

Do you remember Mr. Gentile telling you that?

A Yes.

Q Do you remember Mr. Gentile telling you on that 45 minute telephone conversation:

"You have a job to do and I admire a good honest man."

Remember him telling you that?

A Yes, sir.

Q Now, Mr. Tsotsos, on your direct examination you told us that after this telephone conversation that with the exception of an interlude at Peter Luger's Restaurant, you didn't see Mr. Gentile again on a formal basis until June 12th of 1972; is that correct?

A Yes, sir, that is correct.

Q And I think you explained the void from November 30th until June 12th by telling Mr. Barlow that you were out making your case, that you were going to banks and getting checks and interviewing people; isn't that so?

A That is right.

Q Now, isn't it a fact, Mr. Tsotsos, that by November 30th of 1971, if you had a case, if you had a tax case, you had it then; isn't that a fact?

A ~~It~~ is not a fact.

Q Do you remember telling Mr. Gentile on the telephone conversation of November 30th, "but you know, of

* * *

Q Now, would you estimate that from the entrance of the restaurant, the distance from the entrance to the table where the Gentile family was seated?

A Well, as I said, when you come into the restaurant, you have to walk towards the other end of the bar, and that is where the maitre 'd, or one of the waiters, seats you from, and from that point to where Mr. Gentile was seated, I would say it was about 12 feet, 15 feet, maybe.

Q 12 feet from the entrance to the restaurant?

A No, from the other end of the bar where you stand to be seated.

Q The table itself, Mr. Tsotsos, was more like 30 feet distance from the entrance to the restaurant; was it not?

A I don't know from what point you are talking about.

Q From the point as you enter the front door of the restaurant.

A From the front door, yes.

Q Now, Mr. Tsotsos, I discussed with you before the noon recess, regulations and guidelines that are issued by your department and issued for the purpose of controlling and guiding the conduct of special agents; and you told me that you are familiar with those regulations;

is that correct?

A Yes, sir.

Q And in your investigation of Mr. GEntile's tax returns, did you follow the command of those regulations?

MR. BARLOW: Objection, your Honor.

THE COURT: I will allow it, as far as he is concerned, did he follow them.

A To the best of my ability.

Q And among the regulations somewhere special agents are instructed, are they not, on this type of a case, to advise the taxpayer of his rights; isn't that so?

A Yes, that is correct.

Q And among the rights referred to, the rights that the regulations dictate you should advise the taxpayer, among those is there not the one that says you should tell tha taxpayer that he has the right to have an attorney present while you are conducted your investigation; isn't that one of the rights?

A Yes, it is.

Q And at any time commencing with September 8th and running through August 9th, did you ever tell Mr. Gentile, Mr. Gentile, you have the right to call your attorney and have him sit here while I conduct this investigation?

A No.

Q In fact, Mr. Tsotsos, isn't the converse of that proposition true, isn't it a fact that on June 14th, you said to Mr. Gentile:

Joe, you don't need a lawyer, you would have needed a lawyer, Joe, but you don't need a lawyer now, Joe, because I am going to take care of this.

Do you remember telling that to Mr. Gentile?

A Yes, I do.

Q And of course, among your guidelines and regulations there is something that says that when a special agent is investigating a taxpayer, and we are talking, are we not, Mr. Tsotsos, of a criminal matter -- are we not?

A Yes.

Q That is your function as a special agent?

A Yes.

Q And don't your regulations tell you that when the taxpayer says to you, Look, I don't want to cooperate any more, I don't know what you are doing to me, but I don't want to cooperate any more, doesn't your regulation then say, Leave the taxpayer alone and don't pursue it?

A The regulations, as you refer to them, advise or stipulate that I should not question the taxpayer at

that point.

Q Just so I understood that, the regulations say, are you telling me, that at that point, you should stop questioning the taxpayer?

A If the taxpayer says, I refuse to answer your questions, at that point we stop asking him questions.

Q Do you remember on the phone call of November 30th, Mr. Gentile saying to you:

Look, I don't like the way you are handling this thing and I'm not going to cooperate with you any more?

And do you rememeber your response:

"Well, Joe, would you at least just sit and listen to my questions."

Do you remember saying that?

A At one point I said that.

Q And in fact, you said to him;

"Look, you don't have to answer me, but just do me a favor and listen to my questions."

A He said he would answer my questions.

Q After you pursued the matter; isn't that so?

A I told him that he didn't have to answer my questions, and he said that as far as cooperating, he wouldn't give me records, but he would answer my questions, and later on in the conversation, I said, Well, if we do get together

again, you don't have to answer my questions, but will you at least listen to them?

And he said that he would, that he would answer them if he wanted to.

Q But you weren't proposing, were you, Mr. Tsotsos, that with this bug strapped around your belly, that you were now just going to ask Mr. Gentile questions and don't get responses? That is not what you were expecting to do, was it?

MR. BARLOW: Objection, your Honor, it calls for the state of mind.

THE COURT: No, this was something that had already been accomplished.

You may answer it, whether or not that was the intention.

He may answer it.

A Mr. Gentile never told me he would never answer my questions.

Q Mr. Tsotsos, let me ask you this --

A In fact, I was urging him, if you have read the transcript, that he shouldn't talk to me if he didn't think it was -- it would be in his interest.

Q Let me ask you this, Mr. Tsotsos:

Commencing with September 8, 1971 and for

* * *

subpoena, take me before the Grand Jury": now, isn't he saying to you that he is going to raise his right hand and expose himself to 26 Grand Jurors?

MR. BARLOW: Objection, your Honor, that is not in evidence.

THE COURT: No.

I would say that is a bad question.

It will be 23, anyway, Mr. Schettino, as a maximum. No alternates involved.

MR. SCHETTINO: I feel affluent this afternoon. I threw in the three others.

THE COURT: There are no alternates involved or allowed even.

Q Now, Mr. Tsotsos, as an investigator, it is not your function, is it, to pressure people into giving you explanations?

A That's correct.

Q Do you recall telling Mr. Gentile, when he had said to you that he would get you certain information or explain something, do you remember saying to Mr. Gentile, "Well, Joe, what are you waiting for? Are you waiting for them to bang the gavel?"

Do you remember that?

A Yes.

Q Do you remember telling Mr. GEntile on another occasion when he said to you, "Well, I will get stuff on that," do you remember saying to Mr. Gentile, "Joe, time is running out. I don't know what you are waiting for"?

Do you remember telling him that?

A I remember telling him sometbing to that effect, yes.

Q You appreciate I am not quoting, I am paraphrasing.

But do you agree, in effect, that you told Mr. Gentile that?

A Yes.

Q Now, there was no urgency, was there? You had your option ? If you had a tax case, you go to your office and you tell them you've got a tax case and tell them to indict Mr. Gentile; wasn't that your option?

A At that point I still wanted to give Mr. Gentile an opportunity to explain certain things that had come up during the investigation.

Q And you were so enthused about giving him that opportunity, that you said, "Joe, what are you waiting for, until they bang the gavel?"

MR. BARLOW: Objection.

THE COURT: Yes. The preface is bad.

Q Now, Mr. Tsotsos, is it a fact that anything and everything that you were pressing Mr. Gentile about was available to you by virtue of the power of the Government and the subpoenas that could have been issued to banks and to other sources; isn't that so?

A I don't understand your question.

Q Well, let me try to give you an example.

If you have me under investigation for my tax return, can you go to my bank with a subpoena and get my bank statements and my cancelled checks?

A Depends on the bank.

Q Are you suggesting to me that there is a bank in the United States of America that can refuse a directive of the United States Government?

A Can I explain, Mr. Schettino?

Q No. I don't want an explanation. Give me an answer to that question.

You cite me the law that says there is a bank in this country that can refuse to honor a subpoena of the United States Government.

A I didn't say that.

Q So we both agree on that, don't we?

A Well, it's your question. May I explain?

Q I will try again, Mr. Tsotsos, I don't know

* * *

"No shit."

A Yes.

Q You have been a special agent for many years, Mr. Tsotsos, and you know very well if my account is subpoenaed or attached, that my bank, out of courtesy, notifies me; you know that, don't you?

A I don't know that.

Q But you do know, don't you, that Mr. Gentile told you the bank sent me a letter?

A I was surprised to hear it

Q You are not telling us or suggesting, are you, Mr. Tsotsos, that in doing that the bank is violating some law of the United States Government, are you?

A No.

Q Do you remember telling Mr. Gentile, in talking about Mr. Gentile checking where you have been, do you remember telling Mr. Gentile;

"There is one place I have been that you don't know about, Joe."

And do you remember pushing Mr. Gentile to see if he could guess, and do you remember saying to Mr. Gentile:

"I want you to impress me, now."

Now, in conducting this investigation, was

it that important for you to find out whether Mr. Gentile knew where you were going?

Was that important to your investigation?

A I was curious.

Q Do you remember Mr. Gentile telling you, well, you know, if you go to friends of mine, my friends are going to come back and say, Hey, Joe, you know, there was a guy here. He showed me a badge from the Internal Revenue Service.

Is there anything peculiar about that in your mind?

A No.

Q Would you not expect a friend of yours to return the same courtesy?

A I would expect it. yes.

Q You don't attach any nefarious purpose to that, do you?

A No.

Q But you did want Mr. Gentile to impress you, didn't you?

A I was interested, yes.

Q In fact, you pursued it.

Do you remember saying to Mr. Gentile;

"No, no, where else have you checked where I

have been?"

Do you remember Mr. Gentile telling you;

"No, it is not where I have been. It is where people come back to me and tell me that you have been there."

Do you remember him telling you that?

A Yes.

Q But you said to Mr. Gentile, did you not:

"Gee, Joe, it looks like you have got me under investigation."

Do you remember saying that?

A Yes.

Q Do you remember, Mr. Tsotsos, in your conversation with Mr. Gentile, when Mr. Gentile said to you, "Well, that is something I'm going to have to show you."

MR. BARLOW: I object, your Honor, just to get a time reference to this. Which conversation is Mr. Schettino asking about?

Q All right, this, Mr. Tsotsos, and of course I will certainly,if you tell me you want me to relate to a particular date, I will be glad to do it, but I am particularly referring to the conversation of June 12, 1972, and do you recall in that conversation Mr. Gentile telling you:

"Well, I will have to get that stuff. I will do it when the time comes."

Do you remember your saying to Mr. Gentile: Well, what are you waiting for?"

Was there some pressure or urgency about when a taxpayer delivers you documents?

Do you impose a time limit, Mr. Tsotsos, because again, Mr. Tsotsos, isn't it so that your option is very clear, when you feel that a taxpayer has evaded the tax laws of the United States, you go in with your report and you get him indicted; isn't that they way it is done?

A Not before you give a taxpayer ample opportunity to explain.

Q That is what you were doing with Mr. Gentile, weren't you, giving him an ample opportunity to explain?

A I would do that to every taxpayer.

Q Now, let me ask you whether or not you do this with every taxpayer, referring again to the conversation of June 12, 1972; do you remember saying to Mr. Gentile:

"I'm going to ask you a specific question. Of course there are no witnesses here."

We did establish that on June 12th you had a bug?

A That is right.

Q "-- of course, there is no witness here. You know damn well I can't hold you to it, but I want to know whether you are lying to me, whether you are bullshitting me all the time."

Do you remember saying that to Mr. GEntile in your conversation of June 12th?

A Yes.

Q And in the investigation that you conducted of taxpayers, is it your custom and habit to direct questions of that sort to a taxpayer?

A Do you want a response?

THE COURT: That is a question.

Direct those -- Do you direct those questions to taxpayers on investigations?

Yes or no?

A Yes.

Q Again, referring to the conversation of June 12th, do you remember saying to Mr. Gentile;

"Joe, as I said before, if you have any information or any evidence in your defense, you'd better submit them right away before it is too late."

Do you remember saying that?

A Yes.

Q Do you remember Mr. Gentile's response:

"Before it's too late? What's too late? Are you going to put me in jail? Before it is too late? What's too late? The guy upstairs, if the guy upstairs calls me, it is too late."

Do you remember that response?

A Yes.

Q And again, your option was clear, was it not, take your information, go to the Grand Jury and indict him; isn't that your option?

A Not when he tells me he has information to submit. He kept telling me he could explain these things.

Q And of course, Mr. Tsotsos, when you interview a taxpayer, you expect and you want the taxpayer to tell you the truth, isn't that so?

A Yes.

Q Do you remember telling Mr. Gentile:

"Joe, I don't expect you to be honest with me. You are not a stupid man."

Do you remember saying that?

A What day was that?

Q In the conversation of June 12th.

A I don't know if I said it that way.

Q Do you remember telling Mr. Gentile, again

we are still at June 12th:

"I am not offended if you stretch the truth or you omit things or you don't tell me things. I am not that naive where I expect you to come forward and say, yes, Nick, you are right on this and on that and I have this much income and I did not report it. Put the cuffs on me. I don't expect that, Joe; but don't bullshit me either. You know, don't make a fool of me. I want you to be as honest with me as you can."

MR. BARLOW: I object.

If we are going to have reading like that, could we have the page reference to the transcript?

MR. SCHETTINO: June 12th, bottom of page 25.

Q Do you remember that?

A Yes.

Q And when you conduct your tax investigations, do you make it a habit to tell the taxpayer, look, I don't expect you to be honest with me.

A I didn't say it in that context.

Q I didn't hear your answer.

A I don't expect the taxpayer to confess, but I urge the taxpayer, if he is going to talk, to tell me the truth.

Q Of course, Mr. Gentile, did he not, Mr. Tsotsos, on June 12th, suggest to you, told you directly, without equivocation, that if he has done something wrong, that if he is not telling you the truth, subpoena me, I don't know for what, but subpoena me and go ahead and do that.

Do you remember Mr. Gentile telling you that?

A Yes.

Q Now, certainly, Mr. Tsotsos, by June 12, 1972, a year from the time you were assigned Mr. Gentile's tax returns, you had all of the information, all of the cancelled checks, all of the information to go in and to present a tax case, did you not?

A I am maintaining that I did not.

Q November 30, 1971, the telephone conversation, you told Mr. Gentile you have the evidence, didn't you?

A I said I had some evidence, yes.

Q May I ask you this, Mr. Tsotsos, insofar as your job is concerned, if you show that I evade one dollar in taxes or one million dollars in taxes, the function is, is it not, to show that I evaded taxes; isn't that so?

A It is tough for me to answer that question. I cannot answer that yes or no.

Q Well, it is somewhat like being half

pregnant, you have either evaded the tax law or you have not; isn't that the question we are talking about?

A Not when it comes to recommending prosecution.

Q Now, in connection with recommending prosecution, you made it very clear to Mr. Gentile, did you not, on June 14th, that it was up to you, and you alone, that only you could recommend prosecution or not recommend prosecution? Did you make that amply clear to Mr. Gentile?

A I told him that, yes.

Q You told him that on several occasions, did you not?

A I don't know if I told him that on several occasions, but I remember telling him that on one occasion.

Q Insofar as your tax cases are concerned, Mr. Tsotsos, did you have any better tax case on June 14, the day you tell us Mr. Gentile suggested a bribe to you, did you have any better tax case on June 14th than you did on June 12th?

A It was somewhat better, yes.

Q Your case improved during that two day period, did it?

A As a result of the bribe offer, yes.

Q Now, you are not suggesting to me or to this

jury, are you, that it is your function as a special agent to induce the taxpayer to bribe people, is that what you are telling us?

A No.

Q But you are telling me, your case became better because the man offered you a bribe; is that what you are telling me?

A It established intent.

Q You do not have a law degree, do you, Mr. Tsotsos?

A No.

Q So you have nothing to do with the legal enforcement or interpretation of a law, do you?

A I enforce the law.

Q You enforce the law?

A Yes.

Q Insofar as people are concerned, that are evading their taxes, is that right?

A Yes.

Q Now,it was on June 12th, was it not, that for the first time, when you went into Manhattan they patted you down, they searched you, they counted your money and they searched your car; isn't that so?

A Yes.

Q And as I suggested to you before, that when

you would have your little rendezvous after each one of these meetings and you went into Manhattan, you discussed the conversation and planned the activities for the next day, did you not?

A For the next day?

Q Yes, the next day, the next meeting.

A In a sense, yes.

Q Now, this meeting of June 14, was your idea, it was your idea, was it not?

A I called him up and made an appointment, yes.

Q Yes, you called Mr. Gentile and do you remember the conversation that took place in connection with that call to arrange this meeting of June 14th?

A I think I said I had something to discuss with him.

Q Didn't you go beyond that and say;

"Joe, I got something very important to talk to you about, could I see you?"

A Yes, I recall now, that is what I said.

Q Be that as it may, we all listened to the tape, and when you got there on June 14th, do you recall now what the important matter was that you had to discuss with Mr. Gentile?

A Well, there were two matters .

Q Do you remember when you got there on the 14th, telling Mr. Gentile:

"This is why I wanted to see you right away, I got information, our boys observed a gold Cadillac following you."

Do you remember that?

A Yes, sir.

(continued next page.)

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Q Is that the way you investigate a tax case, by telling the taxpayer his wife is cheating on him or that there is a car following him, is that the way you conduct --

MR.BARLOW: There is no evidence of the fact as you said, that Mr. Gentile's wife was cheating on him .

MR. SCHETTINO: And I don't intend to suggest that there was, that was a supposition.

You understood that, Mr. Tsotsos, didn't you?

THE WITNESS: Yes.

Q Mr. Gentile didn't ask to meet with you on June 14th, did he?

A No, he had asked me on June 12th to show him some checks, and that is why I called him, but I also had this other thing to tell him, that you are referring to.

Q Yes.

On June 14th, you brought some checks with you; is that right?

A Yes.

Q And you said to Mr. Gentile, "I have something to tell you, first of all, Joe, and I brought the checks along, I want you to look at it, too, this is why I wanted to see you right away, our boys observed a gold Cadillac following you."

That was your initial conversation with Mr. Gentile on June 14th, the gold Cadillac, was it not, not the checks?

A I went to discuss both matters with him

Q Well, let us put it in proper priority:

Which did you discuss first?

A I think the first one involves something that was a little more urgent.

Q Do you remember in that conversation after you disposed of the question of the gold Cadillac, and you discussed with Mr. Gentile certain checks you brought along, do you remember Mr. Gentile telling you:

"You know, you have a lot of checks there, I don't know really whether I have done anything wrong, you know there are so many people that can afford to pay accountants" --

I detect, Agent Tsotsos, a grin on your face-

A It sounds like I've heard that before.

Q Oh, I submit that since October, you have heard this.

In any event, back to the conversation of June 14th.

Do you remember Mr. Gentile telling you:

"Somebody can pay an accountant $100,000,

they can pay an accountant $50,000, and those accountants know what to do with a tax return."

Then do you remember Mr. Gentile going on and talking to you about corruption in the world, discussing with you that there are Democratic political clubs, there are Republican political clubs and that these people do one another favors, and do you remember for a considerable amount of time his discussing in general the fact that we live in a world where unfortunately, we do have people in Government, in politics, that do people favors?

MR. BARLOW: Your Honor, I'm going to object. Is this in the nature of a question?

MR. SCHETTINO: I am saying, Do you remember his discussing --

THE COURT: Let me hear the question.

Q I am assuming when I am finished, you are going to tell me yes, or you are going to tell me no, but do you remember that general type of discussion?

A Yes, sir.

Q And do you remember your saying;

"You are talking in circles."

And do you remember Mr. Gentile saying:

"Because you don't understand."

And your response:

"Well, you are playing with me."

And do you remember your saying;

"Yeah, but you're not penetrating me, Joe, I don't follow you."

Do you remember Mr. Gentile saying:

"I can't enlarge on it any different than what I said. Some day, some day, you are going to know what I am talking about."

Do you remember your answer, your response:

"What do you mean, seriously, what do you mean?"

Mr. Gentile says:

"Corruption, it goes on every day."

And you say;

"Yeah, but how does it relate to us?"

And Mr. Gentile's reply:

"It doesn't relate to us, it doesn't relate to us, I'm telling you what is going on, we're talking about people."

Do you remember your persistence:

"Yeah, but how do we do it, Joe, tell me what do you mean?"

And do you remember, Mr. Tsotsos, immediately after that general conversation, your saying to Mr. Gentile:

"Well, it's true, I've done a lot of work on this case."

And Mr. Gentile saying:

"I know that."

And your saying:

"But why shouldn't I, Joe?"

And do you remember Mr. Gentile's response:

"I don't know. Do it. Do it, I say to you, do it, do your work. I say it, do your work, do it honestly, that's what I say, and you told me 'yes, I'll do it.'"

Do you remember your response:

"What's your definition of 'doing it honestly?'"

THE COURT : Mr. Schettino, could you hold it for a few seconds?

MR. SCHETTINO: Yes, surely.

(At 4:23, Judge Costantino left the bench and then returned in five minutes.)

THE COURT: All right.

MR. SCHETTINO: Do I understand that your Honor was going to recess at 4:30?

THE COURT: Well, between 4:30 and 20 to 5 . You have a little time yet.

Do you think you will be through?

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N I C H O L A S T S O T S O S, called as a witness, having been previously duly sworn by the Clerk of the Court, took the witness stand and testified further as follows:

CROSS-EXAMINATION

BY MR. SCHETTINO (continued):

Q Good morning, Mr. Tsotsos.

A Good morning.

Q Mr. Tsotsos, do you recall that during yesterday's examination, you told us that one of the reasons, or at least one of your reasons, for this rather extensive investigation and numerous meetings was that because you felt you wanted to give this taxpayer, as you do with all taxpayers, an opportunity to give you explanations; isn't that correct?

A Yes.

Q Now, do you recall in your phone conversation with Mr. Gentile on November 30th of 1971 where you were discussing with Mr. Gentile his income and checks and his interest in the car wash, do you recall Mr. Gentile saying to you --

MR. SCHETTINO: I am making reference, Mr. Barlow, to Page 19 of the transcript of November 30th.

Q (continuing) Do you recall Mr. Gentile saying to you:

"Well, look, you come on over here, I'll have

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with the taxpayer and the accountant, the man that is familiar with the taxpayer's finances, isn't that the best way to get an explanation?

A Eventually we would have gotten to that point.

Q And of course, you didn't have to do this in this case because on November 30th you had all the information you needed; isn't that correct?

A No, that is not correct.

Q In telling us that your sole purpose here in pursuing Mr. Gentile was to afford him an opportunity to explain things to you, did you feel that you were accomplishing that purpose on June 14th when you were exhibiting certain checks to Mr. Gentile and Mr. Gentile was impressed with your files and said to you:

"You are really looking to put me in jail, aren't you?"

And do you remember replying to Mr. Gentile:

"Well, did you ever think otherwise?"

A Yes.

Q Do you recall that conversation?

A Yes.

Q And of course, Mr. Tsotsos, if the sole purpose of this investigation, of this bugging, was to get explanations, when you found out that, in a two-hour

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on June 14th:

"That is not a satisfactory explanation, Joe."

Do you remember saying that?

A Yes.

Q Now, Mr. Tsotsos, as a special agent, your function, is it not, is to recommend prosecution if you feel that is warranted after your investigation; isn't that your function, essentially?

A If the facts and evidence merit such recommendation, yes.

Q Yes.

It is not, however, your function to quarrel with the taxpayer, is it?

A No.

Q And of course when you said to Mr. Gentile, "That is not a satisfactory explanation, Joe" do you recall him saying:

"Well, it satisfied me as far as I am concerned."

Do you recall that?

A Yes.

Q And yet you persisted, did you not, in telling Mr. Gentile that as far as you were concerned that was not a satisfactory explanation; did you not?

A Yes, I told him that.

Q And that, of course, Mr. Tsotsos, that of course would have been the function of a court, of a jury, a Grand Jury, that is their function, to determine whether or not the taxpayer -- his explanation is satisfactory, is that not so?

A I don't know.

Q Now, after telling Mr. Gentile on numerous occasions that these are not satisfactory explanations, do you remember saying to Mr. Gentile, and my reference again is to the conversation of June 14th, do you remember saying to Mr. Gentile:

"Let me ask you something, let's assume I have a good solid case against you for tax evasion, why shouldn't I recommend prosecution?"

Do you remember saying that?

A Yes.

Q Are you normally so solicitous with taxpayers, do you ask all the taxpayers you investigate as to why you shouldn't recommend that they be prosecuted?

A The answer to your question is what the conversation was that he and I had which preceeded that.

Q Mr. Tsotsos, I have full confidence that Mr. Barlow will cover that in redirect.

Then do you remember Mr. Gentile saying to you:

"Well, look, I'm not a bad guy, why would you be looking to put me in jail?"

Do you remember him saying that to you?

A Yes.

Q Do you remember your replying:

"Joe, the kind of guy you are is not at issue."

Do you remember that?

A Yes.

Q Do you remember Mr. Gentile saying to you:

"What I am trying to tell you why you shouldn't recommend prosecution is because I am a good guy."

Do you remember that?

A Yes.

(continued on next page)

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Q Do you remember your then pursuing it further:

"That's not good enough for me, Joe."

Do you remember that?

A Yes.

Q Then do you remember Mr. Gentile saying:

"Well, then, what can I tell you. I told you that I have to get around it unless you have any other --"

Do you remember your interjection:

"How would I do that?"

Do you remember that?

A Yes.

Q Do you remember Mr. Gentile saying:

"I don't know. I guess I'll have to get ahold of these people and I guess I'll have to get those affidavits."

Do you remember him saying that?

A Yes.

Q Do you remember your saying:

"Well, what will that prove?"

A Yes.

Q And do you remember Mr. Gentile explaining:

"Well, perhaps it would prove that somebody gave me a check,he asked me to cash it and I

cashed it for him."

Do you remember that?

A Yes.

Q Do you remember Mr. Gentile saying:

"Look, I'm not as bad as it looks here, I'm certainly not that crooked, that I don't go for."

Do you remember that?

A Yes.

Q Do you remember again right on top of that your saying:

"What do you mean?"

Do you remember that?

A Yes.

Q Do you remember Mr. Gentile saying to you:

"You know, this becomes very embarrassing when you have to go to people and say, 'Look, I need an affidavit from you, I've got to get an explanation, the Internal Revenue is investigating me.'"

Do you remember him saying that?

A Something to that effect.

Q Something? I am paraphrasing, you agree, don't you?

A I wish you would distinguish --

Q Well, perhaps Mr. Barlow will paraphrase it

differently. Do you remember that?

A Yes, sir.

Q And then do you recall saying to Mr. Gentile:

"Well, I'm going to have to tell them pretty soon about it."

Do you remember that?

A Yes.

Q The reference being to the fact that you will have to go to these people?

A No. Which people?

Q The people, the checks that youhad with you.

A No. I didn't say that in that context.

Q You did not? And do you remember Mr. Gentile saying to you:

"Well, that's up to you."

A Yes.

Q You remember that?

A Yes.

Q And do you remember Mr. Gentile saying:

"It's not up to me."

Do you remember that?

A Yes.

Q Do you remember your answer:

'Well. I wanted to know what your thoughts were.

Do you remember him saying that, Mr. Gentile?

A That was part of my answer, yes.

Q Do you remember Mr. Gentile saying to you:

"Well, what would my thoughts be, I ask you, I asked you before, how can I get around this thing, and you tell me, Well, how could you get around it, and I told you my way, I told you my way, I told you how I can get around this thing."

A What else did he say?

Q (Cont'g) "I told you my thoughts."

Agent Tsotsos, don't interrupt me, I'll get the whole thing.

A Yes.

Q "I told you my way, now what are your thoughts, see, that's the answer, that's really the answer."

Do you remember your reply:

"You tell me, Joe."

Do you recall that?

A Yes.

Q Then, Agent Tsotos, that conversation went on and on, and the jury will hear the tapes, and then your continuous response to Mr. Gentile's conversation, was it not, was:

"What do you want me to do, Joe?"

Is that not so?

A Yes.

Q And then in sequence the conversation was interrupted, that conversation was interrupted by Mr. Gentile, and then he started talking about his daughter and his son-in-law and the problems they were having; isn't that so, do you recall that?

A Yes.

Q Are you looking at Mr. Barlow or me?

A I thought Mr. Barlow was going to say something.

Q I see. Do you recall that in its sequence, that line of conversation being interrupted and Mr. Gentile started talking about --

A He started talking about other things.

Q Yes.

A Yes, personal things.

Q Right. Now, Agent Tsotsos, isn't it a fact that finally, in answer to your repeated question, "What do you want me to do, Joe?" -- it is a fact, is it not, that Mr. Gentile then said to you:

"Here, if we can get around this here someway and there's a chance of getting around this here, you tell me, you tell me just yes or no, that's all."

Do you recall that?

A Yes.

Q Now do you remember, do you further recall -- and I'm not going to read the whole thing to the jury unless Mr. Barlow wants to do it -- that Mr. Gentile then continued in sequence and went on for some five or ten minutes discussing his daughter-in-law, discussing matters concerning his wife, and that his total reply consumes some five or ten minutes. Do you recall that?

A Before I answered, yes.

Q Yes. And after that rather lengthy diaglogue of Mr. Gentile's, do you remember your saying:

"The answer to your question, Joe, is yes."

A Yes.

Q Do you recall that?

A Pardon me?

Q I say do you recall that?

A Yes.

Q And do you remember Mr. Gentile saying:

"What, yes what, oh, that we can get around it?"

Do you recall that?

A Yes.

Q Then your saying to Mr. Gentile:

"Joe, I want to make something perfectly clear to you, I don't want anyone to know what you and I transact, I don't want anyone to know our business."

Do you recall that?

A Yes.

Q Now, Mr. Tsotsos, up to that point, had you and Mr. Gentile transacted anything?

A Yes, we had.

Q You had? Had you transacted anything other than the fact that you said to Mr. Gentile: "The answer to that question is yes"?

A No.

Q And do you remember Mr. Gentile's reply to your statement that you didn't want anybody to know what you were transacting, do you r member him saying:

"I wish I could believe that."

Do you remember that?

A Yes.

Q And then do you recall after that there was some dialoque regarding Mr. Frank Coppa?

A Yes.

Q And do you remember telling Mr. Gentile that you were concerned about Frank Coppa because you thought that

* * *

Go ahead.

Q Now again, Mr. Tsotsos, there is much dialogue I am passing over, but I still am on the conversation of June 14th. Do you recall saying to Mr. Gentile:

"You know, you can do a favor for me, you know I have a case on Ernie, your buddy, and I want to get together with him, I'm going to ask him some questions."

Do you remember saying that?

A Yes.

Q Up to that point, this transaction that you talk about, was there mention of money, had any money passed?

A Not at that point.

Q Then again, I am skipping, Agent Tsotso, there is much, much dialogue concerning Mr. Gentile's life, where he tells you that his father died when he was two years old --

MR. BARLOW: Objection, your Honor.

MR. SCHETTINO: It is on the tape, your Honor.

THE COURT: I don't know; I don't have a copy of that and I don't have a copy of my rulings.

MR. SCHETTINO: I am using, if it please your Honor, the redacted tape that was given me by the Government, and I assume that the jury will hear that.

MR. BARLOW: In that case I will withdraw

the objection.

Q Do you remember, Mr. Tsotsos, that there was much dialogue, it may have gone on for ten, fifteen, twenty minutes, in which Mr. Gentile told you about his life, that his father died when he was two years old, that he had to go to work when he was seven years old to make $13 a week to help support the family; do you recall all of that dialogue?

A Yes.

Q And it went on for a considerable amount of time, did it not?

A Yes.

Q While the dialogue was still going on, do you remember then saying to Mr. Gentile:

"Let's get, let's get back to this, what do you want me to do?"

Do you recall that?

A Yes.

Q And do you remember Mr. Gentile's answer:

"Well, you tell me, you tell me."

Do you remember that?

A Yes.

Q And do you remember your saying:

"I don't want any misunderstanding, I don't

want any misunderstanding, Joe."

A Yes.

Q You remember that?

A Yes.

Q And do you remember Mr. Gentile saying:

"You don't feel bad for helping me, do you?"

Do you remember that?

A Yes.

Q Do you remember, do you remember saying:

"Well, no. I think you are a nice guy."

Do you remember that?

A Yes.

Q And then do you remember Mr. Gentile saying to you:

"Okay, then, if your conscience is at ease because I'd as soon cut off my left arm than hurt you, I want you to be able to go home and I want you to be able to rest, what do I do, do I need a lawyer here, do I have to get a lawyer?"

Do you remember that?

A Yes.

Q And do you remember your answer:

"No, not at this point."

Do you remember that?

A Yes.

Q And do you remember your saying:

"Now, you don't have to get a lawyer, if you had waited then it would have been a different story and I wouldn't be able to help you, but at this point I can do something for you and you don't have to get a lawyer."

Do you remember that?

A Yes.

Q Do you remember your answer?

A Yes.

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CROSS-EXAMINATION

BY MR. SCHETTINO: (Cont.)

Q And then there is more dialogue that follows. Then do you remember your saying to Mr. Gentile:

"All right. We haven't talked about money, yet. I am going to let you make me an offer. What the hell, you got to make it worth my while, Joe, because I am the one that's taking the chances."

Do you remember saying that?

A Yes.

Q At any time up to that point, did Mr. Gentile suggest money to you, did he mention money to you or did he give you money, up to that point?

A Yes, he did.

Q He gave you money?

A He mentioned money.

Q And of that you have no doubt?

A I have no doubt. I can recite it for you if you like.

Q And after you told Mr. Gentile it was time for him to make an offer, he in fact made you no such offer, did he?

A I don't know what you mean by that.

Q Well, when you said to Mr. Gentile, "Joe, what

the hell, make me an offer," Mr. Gentile said, "Well, I will make you this offer"? Did he say that?

A No, he asked me what I thought was reasonable.

Q We are going to get to that. I am trying to keep the conversation sequence so the jury knows how this thing went.

Did he, when you said, "What the hell, Joe, make me an offer," at that point and immediately thereafter, did he make you an offer?

A At that point he said, "It is not a question of money. I would still want to feel a little safe. I am trying to figure out how I am going to do it."

Q I appreciate, Mr. Tsotsos, that you probably know by heart and by memory, certain portions of these conversations. And I will at this point compliment you that what you just recited something with tremendous accuracy of the conversation, but my question to you; Immediately after your question to Mr. Gentile, "What the hell, Joe, make me an offer,"did he at that point say what you just said he said?

THE COURT: Can you answer that?

THE WITNESS: I have to think for a moment.

Q You can't recall, Mr. Tsotsos?

A Could I see the transcript, just to be certain?

Q Let me read to you, Mr. Gentile's answer, and this is immediately after you have told Joe, "What hell, Joe, make an offer."

Do you recall Mr. Gentile saying, "Well, you know, you know what you are doing? You know what you can do and you know what you could not do. I still want to feel a little safe. It's not a question of money. I am trying to figure out."

Do you recall that.

A Yes.

Q Then do you remember your saying: "Don't forget, if we bring anyone into this, we are going to have to cut them in."

Do you remember that?

A Yes.

Q And then Mr. Gentile asked you if you ever did this before?

A Yes.

Q And I believe you told him, "Once before"?

A Yes.

Q And I believe you told us on direct examination, that was not the truth?

A Yes.

Q You certainly have never taken a bribe before?

A Never before.

Q Then, Mr. Tsotsos, do you recall Mr. Gentile saying to you: "Well, you have a way out of this"? Do you remember that?

A Yes.

Q Do you remember saying to Mr. Gentile, "Look, what can I tell you. I will give you a guarantee, Joe. I mean I will do the best I can."

Do you recall that?

A Yes.

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CROSS-EXAMINATION

BY MR. SCHETTINO (Cont'd):

Q Then do you recall there was conversation regarding the business about the offer and do you recall Mr. Gintile asking you: What do you want it, before or after?

Do you remember that?

A Yes.

Q And do you remember saying to Mr. Gentile, "No, no, if I wait until later and the case goes through my office, where does that leave me? You can tell me to go to hell."

Do you remember that?

A Yes.

Q And of course, at this point there was no offer, and no money had been mentioned; isn't that so?

A Well, that's your opinion.

Q It's not my opinion, Agent Tsotsos. It is on the tape.

THE COURT: It is not an opinion. He asked you a question.

THE WITNESS: The answer is no.

Q Then, no offer had been made and no money had passed? The answer is no; isn't it?

A No, let's read back the question and I will answer it.

Q Do I take it your no is not an answer?

A Can we have the question re-read?

THE COURT: Read back the question.

(Question read.)

THE WITNESS: My answer is no. It is like a double negative question --

THE COURT: Don't get grammatical. If your answer is no, it is no. We will worry about the grammar later on.

Q You understand, do you not, Mr. Tsotsos, that when I ask you as to whether or not money had been mentioned or money had been passed, do you understand that I am referring to your testimony that Mr. Gentile gave you the sum of $3,000?

Do you understand that that is what I am asking you?

A There was no specific reference to money until I had written the figure $3,000 on a slip of paper. But prior to that point he had made reference to money.

THE COURT: Are you talking about money, bribe, or money inherited --

A No, in connection with the bribe.

THE COURT: Just to make sure we are both on

the same course.

Q Do you remember, Mr. Tsotsos, while you were discussing with Mr. Gentile this question and offer and do you request Mr. Gentile asking you how long this case would take?

Do you remember that?

A Yes.

Q And do you remember your saying, "Betweeen, it might be two days from now, Joe, it could be the end of the week. It could be next week. but it has to be resolved within the next couple of weeks."

Do you remember telling that to Mr. Gentile?

A Yes.

Q And do you remember telling Mr.Gentile, that in your opinion, the way you fixed this thing is that you take care of it criminally but he may have to pay $1,000 on a tax liability.

Do you remember telling him that?

A Yes.

Q Do you remember telling Mr. Gentile, "Do you think I am very proud of what I iam doing? In one way I feel I am helping a guy out, I am saving you a lot of money in the long run. That's the only confort I have, you know.'

Do you remember telling that to Mr. Gentile?

A Yes.

Q Do you remember telling Mr. Gentile, "Joe, I feel that I am trying to save you a hell of a lot of money. I'm trying to save your ass"?

Do you remember saying that to Mr. Gentile?

A Yes.

Q Now, Agent Tsotsos, you got to a point after the repeated requests to make an offer, when you got to a point when Mr. Gentile said to you, "What do you think is reasonable?" I believe you testified that you took a piece of paper, you wrote a figure down; is that correct?

A Yes.

Q And you handed the paper to Mr. Gentile?

A I slipped it over to him.

Q You slipped it over to him?

A Yes.

Q In other words, there was nobody in this room but you and Mr. Gentile; is that right?

A That's right.

Q Then do you remember Mr. Gentile saying, "Well, when do you want this?" And do you remember saying, "Tomorrow"?

Do you remember that?

A Yes.

Q Do you remember Mr. Gentile saying, "Do you want it that fast"; do you remember that?

A Yes.

Q Then do you remember Mr. Gentile was concerned -- do you remember Mr. Gentile saying, "I only hope, I'm going to keep my fingers crossed. I hope I'm doing the right thing. I hope I'm doing the right thing. Do you think I am?"

And do you remember your saying to Mr. Gentile, "Another couple of weeks and it would have been out of my hands," do you remember that?

A Yes.

Q And then Mr. Gentile questioning you, "It would have been out of your hands," do you remember that?

A Yes.

Q And do you remember your saying, "This is the most crucial time in the case. It's where you have to shit or get off the pot."

Do you remember saying that to Mr. Gentile?

A Yes.

Q Now, up to this point, not a penny, a nickel or a dime had been handed to you; is that right?

A That's right.

Q And then after you told Mr. Gentile, that he had to shit or get off the pot, do you remember Mr. Gentile saying, "All right. Then I will see you tomorrow," do you remember that?

A Yes.

Q And, of course, you went back the next day, did you not, Mr. Tsotsos?

A Yes.

Q And I think you told us that when you walked in to Mr. Gentile's office, he made a gesture with his right index finger; did you tell us that?

A Not immediately when I walked in but yes, at one point he did.

Q And in making this gesture did he point to a particular object or direction?

A He pointed over to his desk.

Q He pointed over to his desk?

A Yes.

Q And in connection with that gesture, you then went to the desk, did you?

A Well, he did something else in addition to pointing.

Q What else did he do?

A He went like this (indicating).

Q So, based upon a gesture of this and a gesture of that (indicating), what if anything did you do --

THE COURT: May we indicate for the record what you are doing, unless you want to get it on video-

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counted the money and we shook hands.

Q Agent Tsotsos, you were assigned this case on June 15, 1971, isn't that correct?

A Yes.

Q And your purpose in having received this case was to ascertain whether or not this particular taxpayer was guilty of evading taxes; wasn't that your purpose?

A Yes.

Q Now, if you know, and we are now some 14 months beyond June 15, 1971, if you know, has Mr. Gentile been indicted for tax evasion?

A No.

Q But you did get him indicted for bribery, didn't you?

A He was indicted for bribery, yes.

MR. SCHETTINO: No further questions.

THE COURT: All right, we will take a recess at this time.

(Recess taken.)

fols. (Continued on next page.)

* * *

Q I didn't ask you that. I said, what is the function that you had in connection with this case. You told me one of the functions. Are there any other functions?

A I have other duties, yes.

Q What is the name of the branch to which you were assigned at the time you went out on this case?

A I was in then and I am in now, the Intelligence Division.

Q Isn't that the branch that investigates bribery of special revenue agents by accountants or tax payers?

A No, sir.

Q You have nothing to do with that?

A That's correct. That's not my function.

Q I didn't ask you that. I said, is that the function of the department that you are in?

A No.

Q Is it your function to make a bribery case, was it your function to make a bribery case on Mr. La Ponzina?

A No, that's not my function.

Q Did you state to Joseph Gentile that you had just been assigned a case entitled Ernest La Ponzina and that you had nothing on him?

A Yes.

Q An how many times did you tell him that, tell Mr. Gentile that?

A Several times.

Q When for the first time did you meet Ernest LaPonzina?

A June 29th, 1972.

Q Were you wearing a Kel transmitter that day?

A Yes.

Q And before you met with Mr. LaPonzina, were you searched by other agents of the Internal Revenue Service?

A Yes.

Q What is the purpose of searching you?

A To account for whatever money I have on my person.

Q So that if somebody gave you a bribe, while you were with that person, then when they searched you later, they would find additional money, they would find the bribe money. Isn't that so?

A Yes.

Q And this very first time that you met with Mr. LaPonzina on June 29th, not only did you wear a Kel transmitter, but you also were searched before and after the meeting with Mr. LaPonzina?

A Not afterwards.

Q Not afterwards?

A No.

Q And would you say that was because the people who were listening on the recording devices, didn't hear anything about a bribe being offered or being paid to you, so there was no need to search you again. Is that right?

A Yes, that's right.

Q Wearing a Kel transmitter, and being searched the first time you met Ernest LaPonzina, you tell us now, under oath that you didn't go there to make a bribe case on him?

A That's right.

Q Do you get a search when you go to examine a tax payer on the question of tax evasion?

A No

Q Do you wear a Kel transmitter normally when you go to examine a tax payer normally on a question of tax evasion?

A No.

Q But you say, it wasn't to make a bribe case, was it?

A That's right.

Q Are you friendly with Mr. Barlow?

A Yes.

Q Do you go out socially with him?

A I don't think we ever.

Q Has Mr. Barlow been a visitor at your house?

A No.

Q What does Mr. Barlow call you?

A Nick.

Q Nicky or Nick?

A He calls me Nicky sometimes.

Q Do you call him Freddie?

A Sometimes.

Q Now, these regulations for your department, don't they require you as a special agent, and a special agent, do I understand it, is to determine whether or not there is any criminal liability on the matter of tax evasion, to recommend a criminal case. Is that correct, for tax evasion?

A Yes.

Q And you have regulations in your department, is that correct?

A Yes.

Q And one of the regulations, as I understand it is that when you go out as a special agent, you must identify yourself to the tax payer and say, I am a special agent and my function is criminal as distinguished from a revenue agent who is civil, something in the regulation that you

must identify yourself and tell him the nature of your investigation?

A Yes.

Q Did you tell Mr. LaPonzina that when you met him, that, I am a special agent. Did you tell him that?

A No.

Q Did you tell him you were there to check on a criminal investigation?

A Yes.

Q For tax evasion, possible tax evasion?

A I told him this was a criminal investigation.

Q Concerning his tax, his income tax returns?

A Yes.

Q And did you advise him -- does the regulation require you to advise him of his rights?

A Yes.

Q Does it specifically require you to advise him that he has a right to be represented by an attorney?

A Yes.

Q And did you know, did you advise him of his right to be represented by an attorney?

A No.

Q You knew he had an attorney, didn't you?

A I heard a reference made to an attorney. His

name was never mentioned.

Q Didn't Mr. -- prior to June 89, did Mr. Gentile tell you that Mr. LaPonzina won't talk to anybody, that he spoke to his attorney and his attorney said there is nothing wrong with his returns and he also has his attorney with him, and he follows his attorney's advice, something to that effect?

A Something to that effect, yes.

Q You knew beforehand that Mr. LAPonzina is the type of man that goes to his attorney when he has a problem. Is that right? You knew he had an attorney?

A Yes.

Q In connection with tax matters, right?

A Well, aside from that reference, that one reference.

Q There was only one reference, you say?

A The reference to his attorney, to his lawyer.

Q Yes, only one?

A Aside from that one.

Q Do you know he had an accountant who prepared his return?

A I found ou that day, yes, --no, I take that back. I knew prior to that time.

Q You saw the accountant's name on his returns, didn't you?

A No, the accountant's name didn't appear on the returns.

Q Did you know that his accountant was Lucadana?

A Yes, I recall I had determined that shortly before by meeting with Mr. LaPonzina?

Q Isn't it customary to get in touch with the accountant and say, "Look, we would like to have your tax payer here because we think he took too much off in taxes or deductions or didn't declare it all"?

A I did speak to his accountant.

Q Did you make an appointment with his accountant through Mr. LaPonzina?

A No.

Q Did you ask the accountant to be present?

A No.

Q Did you, as part of his rights, did you advise him that he had the right to remain silent and didn't have to answer any of your questions?

A No.

Q But you were required to, by your regulations. Is that right?

A Yes.

ney fls.

Tsotsos-cross

BY MR. KLEIN:

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Q Would you say you flouted your regulations in this case?

A You would have to understand the capacity in which I was working --

MR. KLEIN: Your Honor --

THE COURT: No, that's a direct question. It doesn't call for a reason.

A (continuing) Yes.

Q Have you ever read Mein Kampf?

A No.

Q Do you know what it is?

A Yes.

THE COURT: We are not going to try that.

MR. BARLOW: Objection.

MR. KLEIN: I will withdraw the question.

Q Do you believe that the end justifies the means?

A No.

Q Was your flouting of your regulations based upon undue zeal?

A No.

Q Was it based upon an inordinate desire to convict?

A No.

Q Do you recall saying to Mr. LaPonzina and to Mr. Gentile, "You know, I'm a square-shooter."

Do you remember that statement?

A I am trying to think. Square-shooter? I said something to that effect. I don't remember the exact words.

Q Did you ever tell Mr. LaPonzina, "Ernie, I'm a square-shooter"?

A I used another expression similar to that.

Q Is that the truth?

A Well, that's what I recall. If you can show me the transcript it would refresh my recollection.

Q I am asking you whether that statement is true, square-shooter?

A Yes.

Q Of your own personal knowledge to this date, has Ernest LaPonzina been indicted for tax evasion?

A No.

Q May I suggest that when you flouted the regulations, you betrayed a trust imposed upon you by the regulations of your department?

MR. BARLOW: Objection. He can sum up at the end.

THE COURT: Sustained.

Q How many agents go out on a fraud case?

* * *

A No.

Q Have you taken a course in acting?

A No.

Q If I gave you a date for one of these meetings, do you think you could tell me ninety per cent verbatim what is on the transcript, with the date, suggestive of the contents of the transcript?

A No.

Q Did Ernie LaPonzina have anything to do with those third party checks which were introduced into evidence?

A No.

Q I believe you testified you found some checks that went through Mr. Lucadana's account and you questioned Mr. Gentile about those checks? Right?

A Yes.

Q Did Ernest LaPonzina have anything to do with those checks?

A No.

Q Do you recall when you said that, you know, Joe, thinking of Mr. Gentile, you can do me a favor. I just got a tax case on Ernie LaPonzina. I have got nothing on him but I would appreciate your making an appointment for me.

Do you remember something to that effect?

A Yes.

Q And Mr. Gentile said to you:

"Well, what about it? What does it involve"?

A Yes.

Q Do you remember him asking you that?

A Yes.

Q What was your answer?

A I said in connection with the same stuff.

Q But it was not the same stuff, was it? It had nothing to do with those checks, is that right?

A That is right.

Q You didn't use the word "stuff", did you?

A No.

Q What word did you use?

A Do I have to say it?

Q You said it to Mr. Gentile.

A I said in connection with the same shit.

Q Now, this wiretap procedure that you were using in 1971 and 1972, that was in the regime of Attorney General John Mitchell, was it not?

MR. BARLOW: Objection, your Honor.

THE COURT: Sustained.

Q Did you use the same Kel transmitter each day?

A I don't know.

Q What happened to the transmitter when you

* * *

A No.

Q You don't know that either?

Now, you told me that it was part of your job and part of your duties to wear a Kel transmitter; right?

A One of my duties is to cooperate with the Inspection Service --

Q And they told you to go out and wear a Kel transmitter and get everything down that La Ponzina says; right?

A I consented to wear the radio transmitter.

MR. KLEIN: Now we are getting to a crucial part here, your Honor, and he is volunteering conclusions.

THE COURT: Yes, you must answer the question and not what you want to answer. But you must answer. If you can answer you must do so. If you don't understand, say so. But if you understand it you must answer it.

Q Did somebody tell you to go out and wear the transmitter -- this is your job for today, go out, wear the transmitter and interview Ernest La Ponzina?

A In a sense, yes.

Q Do you have any choice to refuse to do it?

A Yes, I do.

Q And what would have happened?

A Nothing.

Q Who told you to go out, your supervisor?

A Representatives of the Inspection Service.

Q That's right. Are they superior to you?

A No, they are not.

Q Do I understand that you have the kind of job where you could disregard or flout the regulations if somebody said "Here is the case assigned to you, Ernest La Ponzina, here is the assignment card, here is what you have got to do, go out with the Kel transmitter," that you had a right to disregard and go your own way?

A As I mentioned before --

THE COURT: No, answer the question. It's a pointed question. Yes or no answer.

Q (Cont'g) Yes or no?

THE WITNESS: Repeat the question.

(Record read.)

MR. BARLOW: Your Honor, I am going to object. There are at least four questions involved.

THE COURT: You may answer.

A I could have refused to wear the body transmitter.

Q And what would have happened if you refused it?

* * *

A Joe.

Q You and Joe went for coffee.

That is very important, you remember that, and that is corroborated, isn't it, on the tape?

A Yes.

Q That corroborates the fact that you and Joe Gentile went for coffee, so the part about the gesture (indicating with hand), the guts of this whole case, you got it on tape --

A No, sir.

Q (continuing) Have you, yes or no?

A No.

Q You could have put it on if it happened, couldn't you?

A Everyone knows what this means (indicating with hand), I didn't have to.

Q No, no, just a minute.

You have got a tape, if everybody knew what it meant, all you had to say to Ernie was:

You are telling me when you are rubbing your fingers together that you want to give me money, couldn't you have --

A I think if I had said that, it would have alerted him.

Q But that was on August 8th, wasn't it?

A Yes.

Q But on August 3rd didn't you testify that Mr. Gentile offered you a thousand dollars for Mr. LaPonzina's tax returns, did you testify as to that, on August 3rd,correct?

A Yes.

Q And you also testified on August 3rd you asked him what was his reaction and Mr. Gentile told you, I discussed something with him, whatever it was: right?

A Yes.

Q Now, if Mr. LaPonzina knew about the bribe, why were you worrying about it, you made it with Mr. Gentile, so what would you have to be alerting him for?

THE COURT: Are you waiting for an answer?

MR. KLEIN: Yes, your Honor.

I am sorry, your Honor, it got away.

A Mr. LaPonzina was very aware, was very aware.

Q Mr. LaPonzina didn't even know anything about a bribe, is that what you are saying, you were trying to slip it in sidewises, weren't you?

A No.

Q Why didn't you come out and say, Listen, I got a bribe, but you didn't do that, did you?

A No.

Q The B Series, the B Series, you said that those transcripts are true, accurate and complete as to what transpired during each of those conversations?

A With the exception that the Court has given the jury, yes, sir.

Q I don't understand that, sir, what exception did the Court give the jury?

THE COURT: Inaudibility?

THE WITNESS: About the redacted copies.

Q Oh, except, except for the redactions which are not a part, I am talking about the parts that are in evidence?

A Yes.

Q That is complete?

A Right.

Q A complete version of what took place in each of those conversations: Right?

A Yes.

Q And you made sure of that before you made up these transcripts; is that correct?

A Yes.

Q Where, where on those transcripts is any mention made of a whisper, you know what I am talking about?

A Yes.

Q You testified that Mr. LaPonzina whispered to you

on August 8th that Mr. Gentile is going to pay the bribe: Right?

A Right.

Q Now, you didn't put that in the transcript, did you?

A No.

Q You didn't put it in the transcript, because it never happened, it came to you later as an afterthought.

A Because I couldn't hear it on the tape.

Q You couldn't hear it on the tape.

If Mr. LaPonzina told you that, as you say at the time, why didn't you tell him, Ernie, I can't hear you, speak up, why are you whispering that Joe is going to pay the bribe?

You didn't say that, did you?

A No.

Q You made no attempt to get it on tape, did you?

A No

Q It happened.

A It happened.

Q Weren't you wearing that Kel to go out and get everything down on tape?

A I was wearing the Kel to record our conversations.

Q And isn't a whisper a conversation?

A It wasn't audible enough to appear on the tapes.

Q Weren't you there to make sure that it would be audible enough to appear on the tape, that was the purpose of wearing it, isn't it, so that somebody can't deny that a conversation took place: Isn't that the purpose of it, to preserve a conversation?

A For corroboration of the conversation.

Q And to preserve it, too, isn't it?

A I don't know.

Q You don't know.

Suppose you didn't have th tape, and you got on the stand and told your story like you said, and suppose Mr. LaPonzina got on the stand and said he denied it, then you could bring the tape to show that you said it; right?

A Right.

Q But you didn't do that with this whisper?

A No, you are absolutely right.

R2 fls (continued on next page.)

* * *

Q How many people typed the transcript that you prepared?

A I don't know.

THE COURT: We will have to take about a five-minute recess. I have to take something else.

Would you mind stepping out?

(The jury then left the courtroom.)

(A ten-minute recess occurred.)

(At 2:55 p.m. the jury took its place in the jury box.)

BY MR. KLEIN:

Q Are you wearing a transmitter today?

A What is that?

Q Are you wearing a transmitter today?

A No.

Q Do you feel a little insecure,undressed?

A No, I don't.

Q Did you make a memorandum of this meeting of June 29th?

A No.

Q Did you make a memorandum of the meeting of August 8th?

A No.

Q On August 8th, that is the meeting you say

you had with Ernest La Ponzina?

A Yes.

Q And that is the meeting where you say he did something with his fingers (indicating)?

A Yes.

Q And that is the meeting where you say he whispered "Joe will give you the money"?

A Yes, sir.

Q You don't have a tape on that, it's not on the tape, is it?

A It is not audible on the tape; that is correct.

Q It is not on the tape?

A It is not audible.

Q Is it on the tape?

A It is not audible on the tape.

Q I didn't ask you that, don't volunteer anything, and don't assume that it took place.

Is it on the tape or isn't it on the tape?

A You can't hear it.

Q If it was said?

A It was said.

Q And this was made (indicating with fingers)?

A Yes.

Q It is not on the tape, is it?

* * *

A It is not on the tape.

Q If it were on the tape you would have written it down, wouldn't you?

A I don't follow what you mean.

Q You took English in that course in college you went to?

A Yes.

Q You understand it?

A Yes.

Q Do you feel all right today?

A I feel fine.

Q Do I understand -- did you make memorandums of these other meetings that you had with Mr. Gentile, memorandums, written reports?

A What dates are you referring to?

Q Well, did you make one of June 23rd or 27th, did you make memorandums of any of the meetings that you were with Mr. Gentile alone?

A Could you give me the specific dates and I will answer your question.

Q If I give you a date, then you recollect this happened.

In 1812, the Monroe Doctrine, right?

Did you make any reports as they took place

of these things that you say that happened?

A I don't know what date you are talking about.

Q Any date, did you make one of the three-way conversation between you, Mr. La Ponzina, Mr. Gentile, on June 29th?

A No.

Q Did you make one of the two-way conversation between you and Mr. La Ponzina on August 8th?

A No.

Q And isn't August 8th the date that you say Mr. La Ponzina did two things: He made a gesture and he whispered?

A Yes.

Q Right?

A Yes.

Q You didn't make a report of that, did you?

A I made an oral report.

Q Did you make a written report of that?

A No.

Q You went out with a Kel transmitter and you -- were you searched again on August 8th, by the way, before you went in to see Mr. La Ponzina?

A Yes.

Q Were you searched when you came out?

A No.

Q Because the tapes or the people listening to the tapes and recorders heard that no money passed; is that right, is that why there was no need to search you; is that correct?

A Yes.

Q Suppose Mr. La Ponzina had slipped some money in your pocket with your hand out like that (indicating), would they have searched you on the way out?

A No.

Q What would you have done with that money; would you have turned it in?

A Of course.

Q Sure. So as I understand it now, the gesture and the whisper -- I will withdraw that.

The alleged gesture and the alleged whisper were not recorded on the tape and were not reported by you; is that correct -- in writing; is that correct or not?

A Yes.

Q And you were required to make reports, weren't you, of each day's activity in connection with this case?

A Oral reports.

Q Didn't you make written reports?

A No.

Q No. Of other dates?

A Well, then, you are talking about something else.

Q No, no. You didn't make reports of these two dates that we know --

A That is correct

Q But wasn't it a part of your duty to make a report of what happened, You went out today, you met with me, we played poker or whatever it was, we went to the horse racing, anything, anything of importance you were supposed to make a memorandum of, weren't you, in writing?

A I don't know what you are referring to.

(Continued on next page.)

Q You are Nick, Nick Tsotsos, aren't you?

A Yes.

Q Nicky, did you have a meeting on September 9, 1971, with Mr. Gentile?

A On September 8th.

Q 8th.

And didn't you make a written report in writing on September 9th?

Is that your signature on this piece of paper I show you?

A Yes.

Q Does it say on the tap,"Memorandum of Meeting in Re Joseph Gentile, dated September 9, 1971"?

A Yes.

Q The meeting with Mr. Gentile, isn't that the written report (indicating)?

A I prepared that memorandum, yes.

Q Will you answer yes or no sometimes, maybe?

A If you put the questions that way, I can.

Q All right.

Did you make this report (indicating) on September 9th, the meeting with Joseph Gentile on September 9, 1971?

A It is a memorandum, I made it.

Q Have I been using the wrong word?

A Yes.

Q Did you ever make a memorandum of June 29, 1972 of the three-way meeting between you and Mr. LaPonzina and Mr. Gentile?

A No.

Q It makes no difference if I said report or memorandum, does it?

A It does to me.

Q You didn't make either a memorandum or a report?

A No.

Q Did you make one of the August 8th meeting with Mr. LaPonzina?

A No.

Q A memorandum or a report?

A That is correct.

Q Weren't you required to make memorandums?

A No.

Q These were voluntary on your part?

A Which ones are you talking about?

Q The ones you did make.

A I made them for another purpose.

Q Did you make a memorandum of meeting with Mr. Gentile on December 30, 1971?

A Yes.

Q And when I say memorandum, I mean written memorandums, signed by you?

A Yes.

Q Did you make a memorandum of meeting with Mr. Joseph Gentile on May 30, 1972?

A Yes.

Q Did you make a memorandum of meeting between you and Mr. Gentile on June 14, '72?

A Yes.

Q And another one of a meeting with Mr. Gentile on August 3, 1972?

A Yes.

Q But none of either of the two meetings you say you had with Mr. LaPonzina on June 29th or August 8th; is that correct?

A That is correct.

Q Except for your word on this stand, we have no written evidence, no taped evidence of a gesture or a whisper; is that correct?

A Not anything that I prepared.

Q Just your word so far.

It is not a tape, there are no gestures or whispers on a tape, are there?

A No.

Q And there is no memorandum?

A That is right.

Q Can you identify the originals of any of these tapes from the copies, the naked tapes?

A Without any identification from the tapes?

Q Yes.

A No.

Q Can you identify one original from another without any identification on them?

A Only by listening to it.

Q By looking at them, by looking at them?

A No, there is no, there is nothing identifying the tapes. I could not tell.

Q I noticed on the first couple of days you used lots of gestures, your hands were in sight, now they are not.

Let me ask you this:

If I have my eyes closed, or I was blind, would I hear the same words that somebody else was sitting here would hear, and who was here and watching?

A Yes.

Q And did your gestures, and would you say that your gestures didn't add anything to what the hearer heard?

A I wasn't conscious of my gestures.

Q This is an idiosyncracy of yours?

A It is the way I normally talk.

Q It doesn't, alone it means nothing; is that right? It doesn't add anything to what you said now, does it?

A No, it shouldn't.

Q You know, don't you, that at one point we were permitted by law, and we made a reproduction, and when I say "we," I mean defense counsel made reproductions of tapes, of these tapes here: Do you know that?

A I am aware of that, yes.

Q Do you know that these reproductions were made from a copy?

A I don't know.

Q The reproduction itself.

A I don't know anything about that, about the mechanics of it.

Q Do you know whether the reproduction that we made consisted of the same portions of various tapes from which you made your transcript?

A I have no knowledge of that.

Q How long in inches or feet is any one of these tapes?

A I have no knowledge.

Q Are they all the same length?

* * *

2/1 jb:m

Q As a matter of fact, is that your testimony, that one of these tapes, none of these transcripts that you prepared differed in any respect with what took place?

A Yes.

Q Did you mention that in your conversation with Mr. La Ponzina and also with Mr. Gentile, you were informed that Mr. La Ponzina had previously had a tax audit for prior years? Do you remember that conversation?

A Yes.

Q You didn't tell us that when you spoke about your conversation with Mr. La Ponzina on June 29th, didyou?

A I didn't get an opportunity.

Q Now, was he in fact audited for prior years?

A To my knowledge, yes.

Q You knew it before you went out, didn't you?

A Yes.

Q And do you know that that case -- was he civilly audited or criminally audited; was it a criminal or a civil audit?

MR. BARLOW: Your Honor, I am going to object at this time.

THE COURT: I think you are going far afield. We have been through that civil and criminal, both.

MR. KLEIN: To show no propensity --

THE COURT: I think you are going far afield.

MR. KLEIN: I bow to your Honor.

I might indicate, let the record --let the record indicate that I did bow.

THE COURT: I beg your pardon?

MR. KLEIN: Let the record indicate that I did bow.

THE COURT: All right.

Q Was Mr. La Ponzina present when you say you received $1,000 from Mr. Gentile?

A No, he was not.

Q Was Mr. La Ponzina present when you say you and Mr. Gentile agreed that the price for Mr. La Ponzina's tax returns would be $1,000?

A Mr. La Ponzina was not present.

Q Am I correct in restating your testimony that on August 9th, which was after you saw Mr. La Ponzina -- right?

A Right.

Q August 9th, you met with Mr. Gentile and you got $1,000; is that correct?

A Yes.

Q And that there was -- but there was no conversation at that time as to what it was?

A I don't know what you mean.

Q Did Mr. Gentile say to you, "Here's the thousand dollars bribe to fix Ernie La Ponzina's tax case"?

A He did not say that.

Q Did he say anything? Did he mention Mr. La Ponzina's name at that time as you got the thousand dollars?

A Referred to him --

Q Did he mention Mr. La Ponzina's name? Maybe we don't communicate well without a Kel.

Did Mr. Gentile say, "Here is a thousand dollar bribe from Mr. La Ponzina" --

A He did not.

Q Had you previously said on a prior occasion to Mr. Gentile -- didn't he ask you how much his taxes, unpaid taxes would amount to, and you said about a thousand dollars?

Do you need a date for that?

A What are you referring to?

Q The date.

A Yes.

Q I will leave Mr. Schettino to take care of that.

Whose idea was it to meet with Ernie La Ponzina?

A I had asked for an appointment.

Q Right. Did Mr. Gentile -- after you say you agreed with Mr. Gentile that you could take care of Mr.

La Ponzina's tax returns for $1,000 -- do you remember that conversation?

A Yes.

Q Let me ask you now, what was the date of that?

A It was August 3rd.

Q That was August 3rd?

A Yes.

Q Prior to August 3rd, did you have a conversation with Mr. Gentile about meeting with Mr. La Ponzina?

A Yes.

Q Did Mr. Gentile say. "Why do you need to talk to him? Why do you have to see him personally?"

Do you remember that?

A Something to that effect, yes.

Q When did he say that?

A He said that August 3rd.

Q Did Mr. Gentile say in effect -- I am not quoting, just paraphrasing -- did he say in effect, You and I, Nickie, you can and I can work it out. I don't -- I don't want Ernie to know about it. You don't have to meet him."

Do you remember him telling you that, something to that effect?

A Part of what you say was said in effect.

Q What part was said and what part wasn't?

A He didn't --

Q He didn't use the word "Nickie"? He didn't call you "Nickie"?

A He would just tell Mr. La Ponzina that he took care of it.

Q Took care of it. That's the quote?

A That's what he said.

Q And he said you don't have to meet with Mr. La Ponzina; right?

A That's right.

Q But you persisted? You wanted to meet with Mr. La Ponzina, right?

A Yes.

Q If you had a bribe arrangement going with Mr. Gentile as to Mr. La Ponzina's returns, you wouldn't have to meet with Mr. La Ponzina at all, would you?

A I wanted to.

Q You wanted to get -- you wanted to suck Mr. La Ponzina in, didn't you?

MR. BARLOW: Objection.

MR. KLEIN: All right. You don't understand it? What was it?

THE COURT: He objects.

MR. KLEIN: Just an objection. All right.

I will withdraw the question. I will ask a different one.

Q Didn't you want to make a case on Mr. La Ponzina?

A I wanted to be certain that this is what he wanted to do.

Q Who? Mr. La Ponzina wanted to do?

A Mr. La Ponzina wanted to do.

Q You were concerned about Mr. La Ponzina?

A I wanted to be certain that that is what he wanted to do.

Q Suppose he didn't want to do it? What difference would it make?

A Then it wouldn't have been done.

Q What would -- it wouldn't have been done? Come on, speak plainly. What wouldn't have been done?

A We are talking about a bribe here.

Q We are talking about a bribe, but you're saying that Mr. Gentile offered you --

A Right.

Q Did you ever tell Mr. La Ponzina, "Hey, Ernie, you know, Joe is going to give me a thousand dollars. He's taking care of it for you. So --"

Did you ever tell it to him?

A No.

Q Did you ever say, "I have been bribed by Mr. Gentile"?

A No.

Q "For you, Ernie"?

A No.

Q But you did ask Ernie or Mr. La Ponzina, you did say to him, "Tell me, Ernie, what do you want to do? Do you want me not to recommend --you want me to recommend no criminal prosecution"?

Do you remember asking him that?

A Something to that effect.

Q What did he answer you?

A He said, yeah.

Q What did you expect him to say, no? Recommend a criminal prosecution? You didn't expect any other kind of an answer, did you?

A As a matter of fact, no.

THE COURT: "As a matter of fact, no" the answer is.

Q You snuck that question in there to try and show criminality, because a man says "I don't want a crimina prosecution" you knew -- is that right?

A No.

Q You knew the answer at the time you asked him

the question, didn't you? Didn't you know the answer had to be "Yeah" or "Yes," whichever it is?

A Well, I had to be certain that this is what he wanted me to do.

Q Wouldn't you say it is a foolish question and it deserves a foolish answer? That kind of a question?

A No.

Q Do you have any personal knowledge, of your own personal knowledge, whether Joe Gentile or Ernie La Ponzina met between August 3rd and August 9th -- August 8th -- of your own personal knowledge?

A Between August 3rd and August 9th?

Q August 8th, of your own personal knowledge.

A No.

Q Of your own personal knowledge.

A Do you mean by my observation?

Q I am not going to further your college education. You know what personal knowledge means.

Tell me, you don't understand it? That's all.

A All right. What do you mean by personal knowledge?

Q Are you a Civil Service employee?

A Yes.

Q Do they have an IQ test before they are eligible

to become Civil Service employees?

MR. BARLOW: Objection, your Honor.

THE COURT: He knows what personal knowledge is.

Personal knowledge is what you know, within your own knowledge. You see Mr. Spencer there. That's personal knowledge. He is sitting in the first seat. It's as simple as all that.

All right. That's personal knowlede. You know that.

All right, go ahead.

Q Do you have -- of your own personal knowledge, do you know of any conversation between Mr. Gentile and Mr. La Ponzina between August 3rd and August 8th, 1972?

A By the Court's definition, no.

THE COURT: I haven't got a definition. That is a fact. That is personal knowledge.

Q You say Mr. Gentile paid you $1,000 on August 9th in connection with Mr. -- and you say that is in connection with Mr. La Ponzina's tax returns; is that right?

A Yes.

Q And that took place after your second meeting with Mr. La Ponzina, right?

A Yes.

Q On August 8th, you stated I believe that you came to this -- Mr. Gentile's office or his car wash, the Racket or the Rocket of New York, whatever it is, and nobody was in there, and then you came out and you said you looked around, and in the street you saw Mr. La Ponzina doing something; right?

A Yes.

Q Where was Mr. La Ponzina when you saw him?

A He was standing on the driver's side of a car he was driving.

Q You knew before you began this investigation that Mr. La Ponzina and Mr. Gentile were very good friends? You knew that, didn't you?

A Before when?

Q Before you started the investigation, didn't you know that?

A I didn't know that.

Q You didn't know it. When was the first time that you asked Mr. Gentile to make a meeting with Mr. La Ponzina?

A June 14th.

Q Didn't you say, "Listen, Joe, I got a tax case on your buddy"? What does "buddy" mean to you now?

A Friend, associate.

Q All right. Didn't you say, "I've got a tax case on your buddy"?

A Yes, I said that.

Q The first time you mentioned Mr. La Ponzina's name?

A Yes.

Q Now, I will ask you again, do you want to correct that previous answer when I asked you at the time whether you knew that they were friends?

A You asked me if I had known that before the investigation. My answer is, No.

Q You said before the investigation.

A That's what you say.

Q At the time the investigation started.

A At the time it started, I didn't know that they were connected.

Q Did anybody ask you about connected?

A No.

Q You fitted it in, didn't you? Did anybody tell you that if either one of defense counsel gives you an opportunity to slip a fast word --

A No.

Q This was ad libbed voluntarily by you -- by your own, then?

* * *

THE COURT: Sustained.

MR. KLEIN: All right, I will withdraw it.

Q Do you know that Mr. Shanley stayed in the case until it was assigned for trial? Do youknow that?

A I know he was connected with the case.

MR. BARLOW: Objection to relevancy, your Honor.

THE COURT: Yes.

MR. KLEIN: All right.

Q When did you first start to talk to Mr. Barlow?

A I don't remember, Mr. Klein.

Q How often did you talk to Mr. Barlow? You don't know?

A I couldn't say.

Q You keep an office diary?

A Yes, I keep a diary.

Q Do you have memoranda of every time you came here and visited with Mr. Barlow?

A No.

Q Where did these conversations take place?

A In his office.

Q Did there come a time after listening to the tapes -- did you listen to a replay of the tapes with Mr. Barlow?

A Yes.

Q And Mr. King?

A Yes.

Q And did you review the transcripts?

A Yes.

Q Did someone pointout to you the fact that as far as Mr. La Ponzina is concerned -- withdrawn.

As far as Mr. La Ponzina is concerned, we don't have any talk or money at all? Did anybody point that out to you?

A Are you referring to my meeting with Mr. La Ponzina on August 8th?

Q Any time. August 8. Did anybody point out to you that the transcripts of the tapes and the tapes themselves do not contain the so-called gesture and the so-called whisper?

A No.

Q Nobody called it out to you to your attention? You never discussed it? Did you ever discuss it with them, the fact that the tape is silent? There was no memorandum made?

A No.

Q Nobody called it out?

A No.

Q Then do I assume that it was solely your idea

to testify that there was a whisper and a gesture?

A No, it wasn't.

Q All right. Did Mr. Gentile tell you, do not discuss bribery with Ernie?

A No.

Q Did he tell you Ernie is not that kind of a guy?

A I don't know in what context you're asking me that question.

Q The context I am asking you is if Mr. Gentile had told you that. Do you recall it?

A I don't know what you are referring to. In connection with what?

Q Did he tell it to you in any connection?

A Yes.

Q Did he tell you Ernie would want his lawyer to be with him? Did he? To discuss his tax returns?

A No, he didn't tell me in that sense.

Q Did he tell you that Ernie's lawyer had told him there's nothing wrong with Ernie's tax returns?

A Yes, he told me that.

Q When do you say Mr. Gentile offered you a thousand dollars bribe to take care of Mr. La Ponzina's tax return?

A August 3rd.

Q When for the first time did you discuss golf with Mr. La Ponzina?

A August 8th.

Q Do I understand you are saying now that a bribe was -- a thousand dollar bribe was offered by Mr. Gentile in connection with Mr. La Ponzina s tax returns on August 3rd? Is that right up to there?

A Yes.

Q And that subsequently on August 8th, Mr. La Ponzina offered free golf lessons to you, six three golf lessons; is that right?

A That's right.

Q But you just said the bribe offer was made on August 3rd, the week before?

A Yes.

Q Did Mr. La Ponzina discuss -- withdrawn.

Was this a general question about golf lessons, about golf on August 8th?

A I think at that point it was part of a casual conversation.

Q And he asked you how good is your golf and you said, not too good?

A Yes.

Q And that you could use some lessons; right?

* * *

Q Do you know whether or not there was a charge made for golf lessons by this man?

A I don't know.

Q And you don't know whether it's true or not that you could get six free lessons?

A Not for certain.

Q Did Ernie -- did Mr. La Ponzina say to you, "Listen, I want to give you a second bribe. I want to bribe you. I want to give you free golf lessons. Forget my return"?

A He did not.

(Continued on next page.)

Q He didn't use the word bribe in connection with the golf lessons, did he?

A No.

Q If in fact he knew a bribe had been offered by Mr. LaPonzina, there would be no need to offer free golf lessons as a bribe --

THE COURT: You mean Mr. Gentile.

MR. KLEIN: That is right.

Q If in fact -- please excuse me, ladies and gentlemen, but if in fact Mr. LaPonzina knew that Mr. Gentile had offered a bribe, one thousand dollar bribe a week before. to fix his tax returns, there would be no need for Mr.LaPonzina to offer you free golf lessons to fix his matter, you had already been bribed, right?

A I don't know what his statement was.

Q Now, we will go by dates, June 14th.

A All right.

Q Page 42.

A All right.

Q On June 14, that was a conversation between you and Mr. Gentile.

Is that right?

A Yes.

Q Mr. LaPonzina wasn't even there, was he?

* * *

A That is right.

Q This is before you even met Mr. LaPonzina?

A That is right.

Q Do you recall asking, Mr. Gentile, rather, "You know, you could do a favor for me, Joe, you know I have a case on Ernie, your buddy. I want to get together with him. I'm going to ask him some questions."

Do you remember making that statement to Mr. Gentile?

A Yes.

Q Do you remember Mr. Gentile's response?

A Yes.

Q What?

A He said, what kind of a case do you have.

Q Did he say something else?

A Following that, well, I said, in connection with the same stuff unless you are going, unless you are going to make me say it the other way.

Q If you can express yourself better with four-letter words or with gestures, be the way you were when you were with Mr. LaPonzina and Mr. Gentile. Don't try to edit it for the jury's benefit.

MR. BARLOW: Your Honor, could the Court instruct Mr. Klein to ask questions.

Q Do you recall Mr. GEntile responding to you: "What kind of a case do you have on him. He is my buddy, is right."

A Yes, I remember him saying that.

Q And then you said: "Yes, I, in connection with the same shit."

A Right.

Q This came out of your mouth.

A I said it.

Q And then: "I want to talk to him."

Are you squeamish when you have to use these words, when you have been using them all along?

A It is embarrassing to me, yes.

Q Sure.

In connection with what you did not want to say in front of the jury, but which you said, I want to talk to him, can you set up a meeting.

Do you remember your saying that?

A Yes.

Q You asked Mr. GEntile to set up a meeting with Mr. LaPonzina?

A Yes.

Q Mr. Gentile said, "You want me there?"

Do you remember that?

A Yes.

Q And you said, "I just want to get together with him"; and Mr. GEntile said, "I don't think I should be there."

Then Mr. GEntile said, "What do you want to do with him?"

And then you said, "Well" -- and then there was an interruption, and then on page 43, "Well," -- do you remember that conversation?

Is that correct?

A Yes.

Q We are still on the same date, June 14th, before you even met Mr. LaPonzina.

A Right.

Q Now, do you remember Mr. Gentile saying: "If you want to make a meeting now, this is different, unofficial, non-offician business. This is without any business. We are not going to talk about his official business. We're going to meet as two people. That is what I was going to tell him; but if you left it just with this thing here, that is the way I was going, I told you the one way is to get affidavits."

Do you remember that part?

A Yes, what did you say before you started reading that?

Q What did you mean?

A Did you preface that with anything?

Q I said, did you recall, on page 43, do you recall Mr. Gentile saying that to you?

A Yes.

Q I didn't preface that with any remark. If I did --

A Well, all right.

Q Okay.

Now, page 48, do you recall Mr. Gentile saying, "As far as Ernie, I will get you an appointment with him. Ernie is my buddy, closer than anybody and I am still not going to say nothing, but I don't know what you have on him or what, but there is nothing like this on him, nothing at all like this. I think, I don't know his case, he had something and he straightened it out. He paid so much money."

Do you remember that conversation?

A Yes.

Q You said so much money. That referred to his prior civil audit where he paid his back taxes?

A Yes.

Q Do you recall you saying: "Yes, there was a case on him before, yes."

A Yes.

Q And Mr. Gentile said: "And it is straightened out."

Do you remember that?

A Yes.

Q And you said: "Yes."

Do you remember that conversation?

A Yes.

Go ahead.

Q Now, Mr. Gentile said: "What do vou want to do, ask him about me?"

And you said, "I am going into the same years, I think he was investigated in 1969 and 1970.

"I don't know."

Then Gentile said, "But you have his case open."

You said, "I have him for '69 and '70."

Q That was the tax years in question, '69 and '70 that you were investigating Mr. LaPonzina?

A Yes.

Q I asked you if there was any indictment for '69 and '70 returns which are four or five years ago. Has there been any indictment on Mr. LaPonzina for the tax evasion?

A No.

Q Now, we come to, so actually that first conversation you had with Mr. Gentile, not in the presence of Mr. LaPonzina, spoke only about two subjects, really about making a personal appointment, having Mr. Gentile make a personal appointment with Mr. LaPonzina for you and mentioning about his prior civil audit, in general?

A Yes.

Q And then on June 15th, page 1, you said, "Listen, you know I got a case on LaPonzina. I haven't got anything on him yet. I am just starting the case and I want to get together with him and you know, ask him a few questions. What should I do, just call him up and tell him I want to meet with him or what?"

Do you remember asking Mr. Gentile that question?

A Yes.

Q This is also between you and Mr. GEntile before you met Mr. LaPonzina?

A Right.

Q Mr. LaPonzina is not there: is that right?

A Right.

Q And then on page 2 you say again, "You know, I am just starting this investigation.

"I don't have anything. I want to talk, I want to get somepreliminary information from him, personal history,

background. I want to know where financial transactions and banks are" -- then it is inaudible.

Do you remember that conversation?

A Yes.

Q You stated that?

A Yes.

Q And then later on you state, "All right, I don't have anything on the guy. You know, I am just starting, but I did want to talk to him."

Do you remember saying that?

A Yes.

Q And Mr. GEntile said it is very easy to make an appointment.

Right?

A Yes.

Q And then Mr. Gentile said something to the effect that, "Well, didn't his prior civil audit close out?"

And you said,"Yes, but that was for prior years."

Do you remember that portion of it?

A Yes.

Q Now, did Mr. Gentile tell you during that June 15th conversation that he had spoken to Mr. LaPonzina?

A This is June 15th?

Q Yes.

A Yes.

Q It is very important for you to get the date first. It is important for you to get the date first; is that right?

A Well --

Q It helps you remember what is on the transcript?

A Well, yes.

Q All right, June 15th, go ahead.

A He said I was with him last night.

Q And what happened?

A And then they talked about Mr. LaPonzina's tax situation.

Q Which tax situation, do you know?

Did ne say?

A Well, they were talking about prior audit.

Q The prior tax situation, right?

A Yes.

Q Because you had not begun your tax investigation for '69 and '70, so it had to be prior.

A Well, let me back up a minute. The case was assigned to me in May, so I guess you could say the case started in May of 1972.

Q But you had not met Mr. LaPonzina, had you?

A No.

Q And you hadn't discussed any of Mr. LaPonzina's tax matters with Mr. GEntile, had you?

A No.

Q That is another regulation, isn't it?

You are not supposed to discuss one taxpayer's matter with another.

A He was discussing it with me.

Q All right.

Let me read you what the transcript says. You answered this is Gentile saying something: "I was with him last night. I said, your case was closed,"

And he said, "Yes, '69 and '70."

"I told him what years and he told me '69 and '70."

Now, isn't that what really happened?

A Yes.

Q All that he said, all that Mr. Gentile said was that he spoke to Mr. LaPonzina last night and Mr. LaPonzina said his previous tax case -- withdrawn.

All that Mr. GEntile said is that he, Mr. Gentile said to Mr. LaPonzina, "Hey, your tax case of '69 and '70 was closed, wasn't it," and Mr. LaPonzina said, "Yeah."

One word, isn't that right?

A Yes.

Q Nobody discussed a tax situation, did they?

A I would consider that discussing the tax situation.

Q And that is the way you answered yesterday when you answered Mr. Barlow; is that right?

A Yes.

Q Were you trying to convey the impression to this jury that even before you met Mr. LaPonzina that Mr. Gentile and Mr LaPonzina were discussing Mr. LaPonzina's pending, so-called pending tax case in front of you?

A No, I didn't say that.

THE COURT: All right, we will take a recess at this time.

(The jury withdrew from the courtroom at 3:46 P.M.)

(At 4:10 P.M. the jury entered the courtroom.)

CROSS-EXAMINATION

BY MR. KLEIN (Continued):

Q Also on June 15, you also mentioned the fact that Mr. LaPonzina had concluded his civil tax examination for prior years --

A Yes, what is the question?

Q Didn't you discuss on June 15th the fact that Mr. LaPonzina had been previously examined for a civil audit for prior years and he had concluded it?

A We had discussed something to that effect, yes.

Q Sure you did; didn't you?

A Yes, what you had said before.

Q Yes.

Did you tell us that on direct examination?

A Well --

Q When Mr. Barlow questioned you, did you testify about this prior civil tax audit?

A I didn't go into the details, if that is what you mean.

(Continued next page)

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* * *

Q June 29th, page 31, did you make the following statement in connection with Mr. LaPonzina's rights: June 29th, wasn't that the date when the three of you met?

A Yes.

Q Do you recall making this statement to Mr. LaPonzina, you said, "If I could come up with a good case, I'm going to recommend prosecution, so I mean, I don' have to tell you, you have certain rights and you shouldn't say things that might incriminate you. I didn't have to tell you that, I am sure you are aware of it, but I wanted to give you a chance so that you could make an explanation."

Do you remember making that statement?

A Yes.

Q Later on you said, "I don't have to tell you that, I am sure you are aware of it, but I wanted to give you a chance so that you could make an explanation. I don't have to tell you you have certain rights and you shouldn't say certain things that might incriminate you."

That is twice in the same paragraph, right?

A Yes.

Q On June 29th, did Joe tell you that Ernie was clean?

A I don't know.

Q Did he tell you that Ernie was legitimate?

A I don't know.

Q Did he tell you that Mr. -- did Mr. GEntile tell you that he and Ernie were very close?

A Yes.

Q And did you say, right after you met, you said, "Mr. Gentile said this is Mr. LaPonzina, hiya, Nick, and you said hello, Ernie, how are you."

Do you remember that?

A Yes.

Q And shortly after that, you said, "I am a square shooter."

Is that right?

A I said it.

Q Then you spoke about the prior audit; is that right?

A Yes.

Q And Mr. LaPonzina told you that he was married, his wife works --

MR. BARLOW: Objection, your Honor.

Q And then, do you remember a conversation where you were playing on words, the word safe, s-a-f-e?

A Yes.

Q And didn't it come about where Mr. LaPonzina told you that his daughter was married 11 or 12 years ago;

* *

do that."

You said,"You are safe in telling me that."

Do you remember that?

A Yes.

Q Is there anything to suggest criminality when the word safe is used in that context?

A No.

Q Who brought up the word safe?

A I did.

Q Did Mr. GEntile tell you, "Do your audit of Mr. LaPonzino legitimately. Don't check it out."

A What is that? I didn't hear you.

Q Did Mr. Gentile tell you, in that conversation on June 29th, "Do it, do your job. Go check him out. He is legitimate."

A I don't remember.

Q Did Mr. LaPonzina volunteer to obtain the information that you wanted himself?

A Yes. He said he would give me some cooperation.

Q He said he would cooperate with you and you told him, he told you what you wanted and he would get it; is that right?

A Yes.

Q He said he would get statements or affidavits or whatever; is that right?

A Yes.

Q He said he would furnish you the names of witnesses and that he would cooperate; is that right?

A Yes.

Q Did you discover that Mr. LaPonzina had a bank account, a bank book?

A Yes.

Q How much was the balance in it?

A I think it was around $20.

Q $20?

A Yes.

Q Could it have been $10?

A What does it say there?

Q $10.

A Then it was $10. I thought it was more. I thought it was $20.

Q All right, we will take your word.

Do you remember the part where the three of you were there and Mr. Gentile said to Mr. LaPonzina, "Ernie, don't you see what Mr. Tsotsos is driving at? You are showing an income of $5800 or $6000 and you lived on a few thousand dollars more. He wants to know where did the rest of it come from. Did you borrow it from someone

or not?"

Do you remember that?

A Yes.

Q So Mr. Gentile said that is the point that Mr. Tsotsos was driving at and Ernie said. "Yes, I understand."

Do you remember that?

A Yes.

Q Did Mr. LaPonzina give you his telephone number?

A Yes.

Q Did Mr. LaPonzina say, if you go to these people from whom you borrowed money, go to them directly and it might prove embarrassing because they helped him out and he would rather get affidavits and he would prefer not to circularize amongst them personally.

Did he say that?

A Yes, he said that.

Q Do you remember the part where you told Mr. LaPonzina, so you have been pretty much, during your life, pretty short; is that right?

And Mr. LaPonzina said, "Yes, I have always been short and you said you never had an accumulation of money and Mr. Laronzina said no, I never accumulated, I had to sell a house on 14th Avenue because of money and I am

still paying the mortgage."

Do you remember that?

A Yes.

Q Randish, who is that?

A He is a revenue agent.

Q Is he the one who handled the prior civil audit?

A Yes.

Q And that was closed; is that right?

A Yes.

Q To your knowledge was there ever any prosecution of Mr. LaPonzina for a bribe in connection with that tax audit?

A A bribe in connection with that? No.

Q There was no prosecution to that?

A No.

Q There was no report from Mr. Radish that Mr. LaPonzina had offered him a bribe in connection with that, was there?

A I wouldn't know.

Q But it would have been in the report, wouldn't it?

A No.

Q Do you remember your saying to Mr. LaPonzina,

did you borrow money from Joe and Mr. Gentile saying, if I had it I would give it to him.

Right?

A Yes.

Q Do you remember Mr. Gentile saying, I told you before how close we are, close friends for a lot of years and his mother and father are like my own mother and father and that is how close we are.

Do you remember that?

A Yes.

MR. KLEIN: Do you have page 64?

MR. BARLOW: Yes.

Q Do you remember your saying this: "Are you guys partners in any business?

And Mr. LaPonzina said, "No, no, no, no, definitely not. No."

Do you remember that?

A Yes.

(Continued next page.)

M 4/1

Q You told us before that on that three-way meeting there, that that is the first time you met Mr. La Ponzina?

A Yes.

Q And you went in with the Kel transmitter and you had your pockets searched on your way in?

A Yes.

Q And everything that you were saying was being recorded?

A Yes.

Q By agents working with you or tuned into your Kel transmitter?

A Yes.

Q And was the script your own script or was it prepared in advance?

A The discussion was spontaneous.

Q Were you going to talk about -- you could have talked about the ball game, couldn't you?

A What is that?

Q I say you could have talked about the ball game.

A I suppose so.

Q What made you use the tax situation?

A Well, that is what I was to talk to him about.

Q Right. So when you went there it was to talk about the tax situation; right?

Q Naturally you go there for evidence of a bribe with a transmitter and having been searched first, didn't you?

A I didn't go there with that purpose, that single-minded purpose.

Q Did you ever in your life before or after when you first visit with a taxpayer go out armed with a Kel transmitter and also be searched before you went in, the first time you met with a taxpayer?

A No.

Q Wasn't there some mention made of an honest count?

A I don't know.

Q No?

(Mr. Klein then conferred with Mr. Barlow.)

Q Did Mr. Gentile say to you:

"Do a job, that is what I admire, an honest job, all I want is an honest count from you, that's all, I don't want anything else. You are going to get an honest count or there's something else here, you're going to show it, show it anyway, this is the way we have it, this is the way I'm talking about."

A You are still on June 29th?

Q Do you remember the three of you, Mr.

La Ponzina and you are talking about Mr. La Ponzina's tax returns and Mr. La Ponzina is telling you, Just do your job, give him an honest count."

Do you remember that?

A May I look at the transcript?

Q I beg your pardon?

A May I look at the transcript?

Q You don't recollect that that is in there?

A I don't remember it.

Q All right.

(Document handed to the witness.)

Q Down on the bottom.

A Yes, Mr. Gentile said that.

Q That is right, that is what I asked you, right?

(Document returned to Mr. Klein.)

MR. KLEIN: Is there something funny about this case?

THE WITNESS: No.

MR. KLEIN: You know it is a serious case, don't you?

THE WITNESS: Yes.

MR.KLEIN: Do you find it amusing, two people have to defend their liberty here in this court --

THE WITNESS: No.

* * *

A Mr. Gentile gave me the money.

Q Yes, and is it shown on the tape, the money passing?

A That is a silent act.

Q That is correct, but you didn't put it, you didn't perpetuate it on the tape or let the record indicate that this is three thousand or this is a thousand you are giving me, or this is for you or this is from Ernie, you didn't say that?

A No.

Q And the whisper, you didn't perpetuate that?

A No.

Q What is your answer?

A I did not.

Q And the gesture, you didn't do that. did you, you didn't perpetuate that either, did you?

A No.

Q But the coffee and the grapefruit and the cantaloupe, that is your corroboration, that actually took place, didn't it, about the coffee, the grapefruit and the cantaloupe: right, yes or no?

A Yes.

Q Well, that wasn't what you were sent out to get on the tape about the coffee. the grapefruit and cantaloupe?

A That is just light conversation.

Q They didn't ask you to go out and get that conversation, it was a light breakfast, too, wasn't it?

A No.

Q Did anybody tell you to go back and get him to repeat it, telling him to say, That's a gesture, say it out loud about money, did anybody?

Did you go back? You didn't have any evidence on tape of money passing or any conversation or whisper or gesture of Mr. La Ponzina; did you ever think of going back to him again, arranging another meeting and this time perpetuating it?

A No.

Q You could have struck up another conversation and said, Ernie, you know, that $1,000 that Joe gave me for you -- you could have started with that preamble, could you?

A No.

Q You didn't do it?

A I didn't do it.

Q But you could have, couldn't you, if you wanted to, if it happened?

A It didn't happen.

Q That is right.

A The subsequent meeting --

Q I didn't ask you any question.

A I just didn't want the answer to be confusing.

Q You only had two meetings with Mr. La Ponzina, one with Mr. Gentile and Mr. La Ponzina, the one on June 29th, and the one with Mr. La Ponzina on August 8th; is that right?

A Yes.

Q And you never had a subsequent meeting with Mr. La Ponzina after the one on August 8th where you say there was a whisper and a gesture?

A That is correct.

Q So we are not referring to any subsequent meeting to August 8th, are we?

A No.

Q On August 3rd, you had a meeting with Mr. Gentil in the absence of Mr. La Ponzina; is that right?

A On August when?

Q The 3rd.

A Yes.

Q Right, okay. And did Mr. Gentile tell you, Do it without Ernie, right?

A Yes.

Q And did you say: "Yeah, but I don't want any misunderstanding. Didyou talk it over with him. or what?"

Do you remember asking him that question?

A Yes.

Q What did he say?

A He said, I talked to him.

Q What? I didn't hear what you said.

A He said, I spoke to him.

I asked him -- I will wait for a question.

Q What?

A Do you want me to continue?

Q Did I interrupt you?

Did you hear my question?

A Repeat your question.

Q You can't remember a minute ago, you are testifying to events that took place in 1971 and 1972, and as long as I give you the date and I give you the time you remember it.

I will give you the question again: Did you ask Mr. Gentile:

"Didyou talk it over with him, or what?"

"Yeah, but I don't want any misunderstanding."

Did you ask him that question?

A Yes.

Q Did Mr. Gentile answer it as follows -- withdrawn.

* * *

by step;is that right?

A Yes.

Q Let me ask you this: Are you testifying from an independent recollection of what happened in 1971 and 1972, or are you testifying from memorizing these transcripts chronologically?

A I am testifying from my independent recollection as refreshed by the transcripts.

Q You didn't need to refresh yourself yesterday when Mr. Barlow asked you the very same question, did you?

A No, because I understood the question.

Q You understood when Mr. Barlow asked you the question, you don't understand when I ask you, or do you choose not to understand?

A If you can just tell me what portions of the transcript you are talking about I'll answer.

Q I didn't tell you the page --

MR. BARLOW: Could you tell us the page, again?

MR. KLEIN: You need it, too?

Q If I were to tell you the page, would the page help refresh your recollection, if I asked, or don't you remember what happened on August 3rd?

A Yes.

Q Don't you remember the response made by Mr.

Gentile when you asked him if he talked over the matter with Mr. La Ponzina?

A Yes.

Q What is the response?

A He said that he spoke to him and he asked me what -- let me go back.

He said "I spoke to him, I asked him what he wanted to do, and he asked me, What do you think I should do?"

And then Mr. Gentile turned to me and he asked me, What do you have on this guy --

Q Let me read it to you:

"Tsotsos: Yeah, but I don't want any misunderstanding. Did you talk it over with him, or what?

"Gentile: I didn't talk it over, I called him, I, if I could do something, I'm going to do it, that's it, that's -- but there's nothing there I talked to my lawyer and I" --

And you say: "Then why, why would you want to do this on your own?

"Gentile: Because it's better, better for everyone concerned.

"Tsotsos: Doesn't he see that?

"Gentile: Oh, he might. If I tell him well, look, you can trust Nick -- like a son."

Do you remember that now?

A Yes.

Q And I am reading from the transcript that you made.

A He also said what I just testified to.

Q Just a moment, just a moment, I am reading from the transcript that you made.

A Yes.

Q If I am reading it incorrectly, Mr. Barlow knows what to do.

Is this correct, when you asked him:

"Did you talk it over with him or what?"

And Gentile says:

"I didn't talk it over."

Right?

A Right, then what did he say next?

Q He says: "I called him, I, if I could do something, I'm going to do it, that's it, that's -- but there's nothing there, I talked to my lawyer and I --

"Tsotsos: Then why, why would you want to do this on your own?"

You inserted something in there, something that's not in the transcript, you thought to tell the jury that he said he talked the whole thing over with him, didn't you?

A Yes.

Q The transcript says that: "I didn't talk it over."

That is not what the transcript said?

A That is right.

Q You lied, didn't you?

A No.

Q What is it, a mistake?

A He says I didn't talk to him but then he went on to say I did talk to him.

Q You said he did talk it over with him?

A Yes.

Q But Gentile said: "I didn't talk it over."

That is a denial.

A What does he say next?

Q What?

A What does he say next, what does he say next?

Q What is next?

A "I called him."

Q The question was: "Did you talk it over with him?"

I didn't ask you about calling, calling is something else, if you are going to call him and talk about something else, but did he talk it over. did he talk anything

over with him, and you are trying to show that he talked it over, an offer of a bribe with him, and Mr. Gentile denied it, he said he didn't talk it over with him.

Whether he called him or he did not, he didn't talk it over with him; isn't that what he says?

A That is what he says.

Q That is right, but that is not what you want to get this jury to believe, is it?

You tried to get this jury to believe that Mr. Gentile talked over a bribe in connection with Mr. La Ponzina's income tax return; isn't that what you want this jury to believe?

A The jury will hear the tapes and read the transcripts.

Q Please, please answer my questions, yes or no.

We know the jury is going to hear the tapes, the jury also observes you and your demeanor.

What is the answer? Didn't you try and fool this jury?

A No, I did not.

Q Aren't you trying to get a conviction here?

A Come on, Mr. Klein.

Q I should say,"Come on, Nickie."

You're a square shooter, right?

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Q Now, Mr. La Ponzina, was he present on August 3rd?

A No.

Q Now, on August 3rd, you come in there and you say hello to Mr. Gentile, and you say, "I'll you why I wanted to see you. I have good news for you."

You remember that?

Now, you remember that that's the beginning. Now we are starting at the beginning of it.

A Yes.

Q He says -- after he tells you about the good news, he says, "I wanted to talk to you about -- you know, about Ernie. I know you've been on him, you've been on him. I don't know what you're up to --"

Mr. Gentile says that to you, right?

A Yes.

Q And you say to Mr. Gentile, "Well, what -- what's his intention?"

You asked Mr. Gentile what Mr. La Ponzina's intentions were, right?

A Yes.

Q Listen to the answer Mr. Gentile gave:

"His intentions. He was in the hospital for about a week. His eyes are not too good either. One

cataract operation. Now he needs another cataract operation. He doesn't see too well and he goes to that place there where he's supposed to be working on. You know, the gas station over there. He goes there."

And you say, "I think he does that for my benefit."

Mr. Gentile says, "Yeah,I guess so, but Ernie's not -- not in the category that you put him in, see. So that's why he hasn't approached me saying, 'Joe, I need help. Let him come. Let him tell me day or night, I don't care.' I says, look, Ernie, why don't you -- and I spotted you on 65th Street one day. You know, remember when you made that U-turn. I saw you and I passed you right by."

Don't forget, this is in response to your question, "Well, what are his intentions?"

So far, have you heard Mr. Gentile tell you what Mr. La Ponzina's intentions are?

A No.

Q So that the only word about intention came out of your mouth like so many other words did; is that right?

A I don't know what you mean.

Q Who used the word "intention"?

A I did.

Q That's right. You said, "What are Mr. La Ponzina's intentions?"

A Yes.

Q Mr. Gentile hadn't told you anything? He didn't answer it?

A Not at that point yes.

Q Gentile says, "So I told him, Ernie, what do you want to do? So he says, what do you think I should do? I don't know. I don't think -- but I tell you what you looking for -- what do you have on this guy. There is no checks like you had with me. This guy has got everything in order. He saw his accountant."

I presume when Mr. Gentile is talking about Mr. La Ponzina -- right?

A I think he made a mistake. I think he might have referred to Mr. La Ponzina's lawyer.

Q But he says -- but he's talking about Mr. La Ponzina?

A Yes.

Q You rememb-er that? That is in the next two words. He says, "I mean his lawyer."

You mean he corrected the accountant to lawyer?

A Right.

Q And you know that that correction is in here?

A I was aware of that, yes.

Q "This guy" -- when he says "this guy," he is talking about Mr. La Ponzina?

A Read the sentence.

Q All right. Mr. Gentile is speaking to you?

A Yes.

Q And Mr. La Ponzina is not there. And he says, "Did I tell you what you looking for -- what do you have on this guy. There is no checks like you had with me."

A He's talking about Mr. La Ponzina there, right.

Q Right. "This guy," meaning Mr. La Ponzina, "has got everything in order. He saw his accountant. I mean his lawyer that was taking care of it for him. Everything is all right, Ernie. He says, have I got something to worry about. No -- no, you have nothing to worry about --"

Do you remember Mr. Gentile telling you that?

A Yes.

Q And this is all -- so far, you asked him, what are his intentions.

"...as I've told you before, he is very close to me. You said he was my partner (inaudible) but he is very close to me and naturally whatever I can do for him, I am going to do for him within my power --"

"So I am asking you now what is it. This is

what you wanted to talk to me about. About him."

Do you remember that conversation?

A Yes.

Q So far as your question about intentions, it's been answered except for the last statement of Mr. Gentile where he says that in effect Mr. La Ponzina has got everything in order; he's spoken to his lawyer, right? You asked, what are his intentions. Didn't you mean his intention in connection with a bribe? In fact, Mr. La Ponzina knew about Mr. Gentile offering a bribe for him; isn't that what you meant?

A Yes.

Q You didn't get an answer, did you? Did you get an answer to your question there?

A As to what Mr. La Ponzina's intentions were?

Q Yes. Right there?

A No.

THE COURT: We are going to recess at this point. We will recess until tomorrow morning at ten o'clock. Please don't discuss it with anyone.

(Whereupon the jury retired from the courtroom.)

THE COURT: You can step down.

(Witness excused.)

(Whereupon, an adjournment was taken until Friday, December 13, 1974, at 10 o'clock A.M.)

banker, why don't you give me the satisfaction, Joe, I know you are the banker. I didn't know how right I was.

As I recall the conversation, he went on to say: Joe, we know all about your operations, you are the big bookmaker, you are involved in loan sharking.

Now I renew that objection with the same force and effect that I did in the beginning, but I suggest to your Honor that in view of Mr. Tsotsos' testimony under Mr. Klein's cross-examination yesterday when he very cleverly came out with the word "connection," that we most certainly now --

MR. KLEIN: "Connected."

MR. SCHETTINO: "Connected."

THE COURT: "Connected," not "connected." "I knew they were connected" --

MR. SCHETTINO: "I knew" --

THE COURT: Apparently he said, "I knew they were connected."

MR. SCHETTINO: And -- yes, yes, -- and in addition to that in his testimony and under the cross-examination of Mr. Klein he made a statement to the effect, without using the name, That I ask Mr. La Ponzina whether a certain man was his partner, and he denied it.

Now, I suggest to your Honor that if this jury is

permitted to listen to a transcript where the agent, and again despite Mr. Barlow's objection I submit I will let the transcript answer it, but I insist that the agent, not Mr. Gentile, instigated this and said:

"Joe, you are the banker, give me the satisfaction of telling me that."

Your Honor, I respectfully suggest that letting the jury listen to this is inflammatory, it is prejudicial, and they are going to draw only one conclusion, that Mr. Gentile is a bookmaker, he is involved in illegal nefarious activities, that Mr. La Ponzina is his partner, that they are "connected," and I respectfully suggest that that has no relevancy in a bribery case and that it is only in this case for prejudicial purposes.

I respectfully renew my motion that that part of the tape, making reference to bookmaking and somebody being a banker, and the use of the words that somebody is "connected," that somebody has partners, that is prejudicial, and I respectfully renew my motion that this be stricken from the transcript before this jury is permitted to listen to it.

THE COURT: The only answer the Court has to the argument that you make at this time is that sometimes you ask a question and the question is like leading with your chin, like Mohammed Ali sticking out his left hand and

booping one. The question was asked, Do you know if he is related? He interpreted "related" to mean, Yes, he knew they were connected.

Now a series of statements were made after that and I think one was, I didn't ask you that and you volunteered that, if I recall the testimony to some extent.

Now, the balance of the problem of course is that you gentlemen may argue this before the jury, that is, as to his demeanor and the attitude of the witness while he is on the witness stand, and that is not for the Court to pass upon, that is weight, and weight is before the jury on credibility, not before the Court.

Now as to the inflammatory statements made in the depositions by way of bugging, it goes without saying that there are bound to be some statements in there that will either have a double meaning or they may be inflammatory to some extent, but again how those statements can be relieved of either -- well. That is what you may call quasi-prejudicial, that may result without specifying it, and it is for the lawyers in their arguments to the jury --

MR. SCHETTINO: Judge, may I say --

THE COURT: I don't think the Court has the right to start didacting and saying, Well, all of these conversations cannot go before the jury. I think the

Court would be asserting some kind of province which it doesn't have, I think I would be doing something wrong, committing some kind of error. I am trying to avoid error, I don't permit error, although I am not infallible, not even invincible. But I try at least to be correct.

MR. SCHETTINO: Except, Judge, I have tried in this motion and by argment to pinpoint, and again I'm referring to the transcript, to pinpoint a specific part of that transcript wherein the agent says to Mr. Gentile: You are the banker, Joe, why don't you give me that satisfaction?

Now I respectfully submit to your Honor that what we are doing here is we are putting the defendant's character into evidence without his taking the stand.

THE COURT: No, I don't think so, that doesn't tie in with your opening statement in which you told the jury that if they listen carefully to it they would find it was really the agent that was making all the propositions and none were being made by the defendant, and this is the position that you took in the opening.

MR. SCHETTINO: I took that insofar as my defense of entrapment is concerned.

THE COURT: I understand that.

MR. SCHETTINO: May I just by way of illustration --

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THE COURT: (Addressing Mr. Klein) Do you want to read something?

MR. KLEIN: It has to do with this, I want to correct your Honor's recollection.

THE COURT: Let me hear.

MR. KLEIN: It says here on page 541:

"Q Now, I will ask you again. Do you want to correct thatprevious answer when I asked you at the time whether you knew that they were friends?"

THE COURT: Right.

MR. KLEIN: Then it goes on a bit and then he said:

"At the time it started, I didn't know that they were connected."

Then I asked him: "Did anybody ask you about connected?"

I didn't ask him if they were related.

THE COURT: Related, I didn't mean the word "related," I meant "friends," I know he said that.

MR. BARLOW: Your Honor, I just have several comments on it: first as to that, I think the Court will remember that these weren't Mr. Klein's first questions about Mr. Gentile's and Mr. La Ponzina's relationship, just prior to that, on page 540, at line 12:

"Q You knew before you began this investigation

that Mr. La Ponzina and Mr. Gentile were very good friends? You knew that, didn't you?"

Then a little later on, question on line 23, same page: "Didn't you say, 'Listen Joe, I got a tax case on your buddy'?

"What does "buddy" mean to you now?

"A Friend, associate."

And then it was later on that the word "connected" came up.

THE COURT: No, it is a matter of argument and not for the Court except for the motion to strike. At this point --

MR. BARLOW: Secondly, Mr. Schettino said in connection with Agent Tsotsos that he, Mr. Gentile, was a banker. Well, that is only one interpretation which can be drawn. I submit that there is another interpretation that fits right in with it and is relevant and nonprejudicial evidence in the case. By calling Mr. Gentile a banker, Mr. Tsotsos could very well have been referring to the fact that Mr. Gentile got the three checks, the Denis Flynn check, the Ted Smith check and the Gunderson check not knowing who two of these three people were, and depositing them to his account, and the Court will recall that the final word I think on that was when Agent Tsotsos said, Well, affidavits, that

is not a good enough explanation, Joe, the fact is you end up with the money and you spend it.

Now that fits right in with the evidence in the case, showing the reason, the Government submits, that Mr. Gentile had to offer and eventually did make the bribe to Agent Tsotsos.

MR. SCHETTINO: No, that is not the sequence of this conversation.

That is the most ludicrous argument I have heard in twenty-six years; in fact I was fearful that Mr. Barlow was going to tell you that he was a Wall Street banker.

THE COURT: I was going to say that I thought --

MR. SCHETTINO: I was wondering if he had the temerity and I was looking for it with trepidation.

THE COURT: A banker alone doesn't mean anything bad.

MR. SCHETTINO: No, but the conversation --

THE COURT: You mean the contact, the bugging all --

MR. SCHETTINO: Let me say that my eyes are blurred and imprinted in my eyeballs is the conversation on this tape, and I don't need the transcript, the agent said: "Joe, you are the banker, give me the satisfaction and tell me that."

And he went on to say: "Joe, we know about your operations, you are a bookmaker and a loan shark."

I submit to your Honor --

THE COURT: That is not in there.

MR. SCHETTINO: Yes, that is, Judge.

THE COURT: That he is a bookmaker?

MR. BARLOW: If that is in, then the Government will take a magic marker and --

THE COURT: That is out, the banker is in but the loan shark and bookmaker is out. Any reference had to loan-sharking or bookmaking is out.

MR. SCHETTINO: May I ask your Honor --

MR. KLEIN: You mean the banker connection with bookmaker and shylocking operations?

THE COURT: You are looking at it as an excellent legal mind, but in the mind of the ordinary juror it is something else again, and I am not going to determine whether they are being jaundiced, I haven't got the right to do that.

A banker is what it means, a banker, you are going to tell me, well, you may be playing monopoly but it is up to the jury. That game was popular thirty years ago so I can talk about it now.

MR. SCHETTINO: In view of Mr. Barlow's generous offer that wherever in the tape and transcripts the

words "bookmaker"and "Shylock" appear --

MR. BARLOW: There may have been some inadvertent places where we crossed it out, but I do intend to go through it this weekend and --

MR. SCHETTINO: That will be before the jury listens to the tape recorder?

THE COURT: I understood those parts were not going to go before the jury, that is my understanding. Now I don't review the transcripts, all I do is retain the important parts until the case is finished and I just then remember when something happens.

MR. SCHETTINO: Thank you, Judge.

THE COURT: All right.

MR. SCHETTINO: Thank you.

MR. BARLOW: Yes.

THE COURT: All right.

Well, it went a little longer. Are you ready to continue now?

MR. KLEIN: Yes, sir.

THE COURT: Are you going to continue on cross-examination?

MR. KLEIN: Yes, sir.

THE COURT: Bring the jury in.

(The jury took its place in the jury box.)

N I C H O L A S T S O T S O S, having been previously sworn, testified further as follows:

THE COURT: All right.

CROSS-EXAMINATION

BY MR. KLEIN (Cont'd):

Q Good morning, Mr. Tsotsos. Yesterday, I think we ended up on the question of the meeting of August 3rd; I asked you, Did you ask Mr. Gentile -- do you remember on August 3rd Mr. La Ponzina wasn't there; is that correct?

A Yes.

Q Yesterday I asked you on the meeting of August 3rd between you and Mr. Gentile whether you had asked Mr. Gentile what are Mr. La Ponzina's intentions; do you remember that?

A Yes.

Q And then we went through the transcript and you agreed that Mr. Gentile didn't answer -- you didn't anser that question; is that right?

A Not at that point.

Q The part I read which was the rest of the page, he didn't ask it, did he?

A Okay, right.

Q That was onpage 3, page 3 -- page 4, I am sorry -- page 4.

On page 5, do you recall again your bringing up the subject, you say to Mr. Gentile: "Now, eh, about Ernie, what does he want to do?"

Do you remember asking Mr. Gentile that again?

A Yes.

Q And it is the same conversation, the same day, right?

A Yes.

Q Do you remember Mr. Gentile saying --

A Yes.

Q What did he say?

A He said, "I'll give you something there."

Q Let me read it to you:

"Answer: You talking to me, you're not talking to Ernie you see when you do business with one guy stick to that just one guy. Don't look for anything else. You go to sleep at night, you enjoy your wife, you enjoy your kids, and that's it, you don't have to worry about a comeback, see, so don't do too many things with Ernie because there's got to be some way where you gonna get into trouble. I don't want to see that. I'd rather have you safe with me and I'm safe with you."

Do you remember that response?

A I recall that now.

Q In other words, the answer you gave me was incorrect; is that right?

A Yes, that did occur later in that conversation.

Q Now, I am asking you for an answer, for a yes or no, please.

A Yes.

Q Do you remember on page 9 of the August 3rd, do you remember Mr. Gentile saying to you: "So now as far as with Ernie" --

Excuse me, let's go back to that same one: In other words, when you asked Mr. Gentile: "Now, eh, about Ernie, what does he want to do?"

Well, you still didn't get an answer, did you?

A Right.

Q He in fact told you to stay away from Ernie, you shouldn't go near Ernie and approach him; right?

A Yes, that is right.

Q So that twice you didn't get an answer as to what Mr. La Ponzina's intentions were, is that right, on that day, and twice you were told that Mr. Gentile doesn't want Mr. La Ponzina to know anything about it; right?

A Yes.

Q Now, on page 9 do you recall Mr. Gentile telli

you this: "So now as far as with Ernie, as far as with Ernie, me now as far as with Ernie, eh, I'll take it upon myself, so remember, so help me God, he doesn't..."

MR. KLEIN: Your Honor, would you please explain to the jury that there are certain inaudible sounds here and spaces that I am reading from, that's why I'm hesitating.

THE COURT: I think we have been through that sufficiently. You know there are some parts of the tapes that you can hear and can't understand, you know it is inaudible.

Q "I didn't even know I'm gonna meet you but I told him Ernie, Ernie, I says, if I see him, I says maybe, if I could help the situation, I don't know what he has on you.

"'Yeah, what could he have on me. My lawyer says, says nothing. When he calls you we'll go there and a...' Well, why should it come to that, you know. I couldn't...you know everything."

There is this inaudible portion.

And he said -- some of it doesn't make sense where the words are missing.

"Although he is a close friend of mine, but I'm telling you one thing, if I do (sic) things to myself,

nobody could rat on me. If I start telling it to people, now I talk to Ernie that if I tell him now who is he going to tell it to?"

Do you remember that conversation?

A Yes.

Q Do you remember on page 21, where you are asking him, you were talking to Mr. Gentile, you were talking about Ernie and Mr. Gentile tells you:

"Ernie makes a salary. He's not a wealthy fellow, let's put, let's put it that way."

Do you remember him telling you that?

A Yes.

Q August 8th, August 8th was the day that you say you met with Mr. La Ponzina; is that right?

A Yes.

Q That is the only time you were alone with Mr. La Ponzina; is that correct?

Isn't that the only meeting you had with Mr. La Ponzina where nobody else was present?

A I had seen him on another occasion.

Q I said "meeting." You are telling me about seeing.

A Well, he did say a few words to me on another occasion. Did you -- you are not referring to that?

Q These few words he said to you, did you tell that to the Grand Jury, is it on the tape, did you make a report, is it on a memorandum?

A No written reports.

Q It just came to your mind?

A What is that?

Q In here we are talking about two dates --

A If we are talking about two dates --

Q June 28th -- 29th, 29th.

A (Cont'g) I can answer the question.

Q You didn't testify to anything like that on direct examination, did you? You testified to June 29th and August 8th, didn't you?

A Yes.

Q Now, June 29th was a three-way meeting, you, Mr. Gentile, and Mr. La Ponzina?

A Yes.

Q Is that correct in your mind?

A Yes.

Q August 8th is you and Mr. La Ponzina; right?

A Yes, right.

Q Did Mr. La Ponzina say to you at the beginning of the meeting on August 8th:

"Joe said you wanted to see me."

Do you remember Mr. La Ponzina saying that?

A Yes.

Q "Joe said you wanted to see me." Right?

A Yes.

Q And then you said: "Yeah, I er -did he talk to you or what?"

Do you remember that?

A Yes.

Q And then he said: "He don't talk to me too much, Nick. He said you wanted to see me."

Do you remember that?

A Yes.

Q And then you said: "Well, I wanted to know, Ernie, what your intentions were. You know. What, what did you, what did you want to do?"

Do you remember that?

A Yes.

Q And Mr. La Ponzina says: "Nothing bad, Nick, whatever you are supposed to do, no problem."

Do you remember that?

A That's not exactly what he said.

Q That's not exactly what he said?

What did he say?

A "Whatever you and he spoke about, no problem."

Q "Whatever he spoke to you about, no problem."

Is that what you are saying?

A Yes.

Q He said, all right. Then you say: "What else, what do you want to do?"

Right?

Didn't you ask you: "What else, what do you want to do?"

A No, I said something like --

Q "What do you want" --

A Read it as it reads there.

Q What?

A Read it as it reads there.

MR. KLEIN: Your Honor, I have two different transcripts; that is what is happening.

THE COURT: You are doing the cross-examination, I wouldn't know what you have there.

MR. KLEIN: All right.

THE COURT: You remind me of the blind lawyer trying a case before me in State Supreme Court and he had a paper, and I suppose he was about the same distance, and I said: "If I were you I would put the paper down and put it some place else."

Well, his fellow lawyer next to him was more of

a seeing eye and he said to him: "You mean to say the Judge can see all the way from up there?"

I don't know how he knew how far away it was, but I was up there, I couldn't see it.

MR. KLEIN: All right, we will use that --

THE COURT: That is a true story.

BY MR. KLEIN:

Q And after Mr. La Ponzina said to you: " Whatever he spoke to you about, no problem." Right?

A Yes.

Q Then you say: "I'm not sure I know what." Then there is an inaudible after that.

A Right.

Q And then what did Mr. La Ponzina say?

A That's when he gestured.

Q You didn't hear me. What did Mr. La Ponzina say?

A I don't recall.

Q You don't? Didn't he say: "You want to ask me some questions about what?"

Here, take a look at this. It is on the first page, right here, it is underlined in green ink (indicating).

(Mr. Klein handed the witness the document.)

Q Now, you read it. Do you remember it now?

A That is what he said.

(Mr. Klein then took the document.)

Q Do you see anything about a gesture in there?

A No.

Q Do you think a gesture is conversation?

A It's not spoken conversation.

Q No. When I asked you "What did he say," why did you answer me with the "gesture"?

A I thought that was the response you wanted.

Q In other words, when I ask what does a man say, you give -- you tell me something about a gesture, you think that is what I want?

A I am sorry.

Q Really?

A Yes.

Q Let's go to the last two sentences back:

"La Ponzina: Joe said you wanted to see me.

"Tsotsos: Yeah, I er -- did he talk to you or what?

"La Ponzina: He don't talk to me too much, Nick. He said you wanted to see me."

Correct me if I am wrong.

"Tsotsos: Well, I wanted to know, Ernie, what

your intentions were. You know. What, what did you, what did you want to do?

"La Ponzina: That's a bad thing. Whatever he spoke to you about, no problem.

"Tsotsos: I'm not sure I know what."

"Well, when do you want ... well, what...

"La Ponzina: You want to ask me some questions about what?"

And just before he says, "You want to ask me some questions about what" there are a few inaudibles in there; is that correct?

A Yes.

Q And then what happened after he said to you, what was the next conversation after he said to you, "You want to ask me some questions about what"?

Is that the end of the conversation thre?

A No. Can I look at the transcript?

Q What, you want to look at the transcript again?

A Unless you want to read it.

Q No.

You don't remember?

A There was something else said.

Q Sure, there was something else.

A I don't recall exactly.

Q "Well, what do you want me to do? Discontinue the investigation?"

Don't you remember that?

A No, didn't -- wasn't something said before that?

Q You say something was said before?

A I believe so.

Q All right. It says here: "You want to ask me some questions about what?"

The next thing: "Well, that's -- oh.

"Well, what do you want me to do? Discontinue the investigation?"

You tell me if there is any word, anything said between Mr. La Ponzina in saying to you: "You want to ask me some questions about what?"

And then the next thing that I just read, it follows immediately, doesn't it?

A Yes.

Q And do you recall Mr. La Ponzina's answer when you said to him: "Well, what do you want me to do? Discontinue the investigation?"

A Yes, I remember his answer.

Q What did he say?

A He said, "Yeah."

Q Of course, yes. Then you say: "Write the case

off? That's why I wanted to see you because" --

By the way, out of whose mouth did the words come, "Discontinue the investigation"?

A Out of mine.

Q "You want to ask me some questions about what?"

Out of whose mouth did that come?

A Out of his.

Q Right. Insofar as "intentions": "Ernie, what your intentions were."

"What, what did you, what did you want to do?"

Out of whose mouth did that come?

A I said that.

Q And then did you also say this out of your mouth: "Write the case off"?

Right?

A Yes.

Q "That's why I wanted to see you because I didn't want any misunderstanding."

Did that come out of your mouth?

A Yes.

Q "You know. I felt that if you wanted to do something, you make your own deal. You know what I mean. Um."

A Yes.

Q Did that come out of your mouth too, right?

A Yes.

Q What was Mr. La Ponzina's answer?

A Can I look at the transcript?

Q You don't remember any more? You remembered on direct examination when Mr. Barlow took you down, you had instant recall, but when I ask you something on cross-examination you don't remember it?

A I don't recall the transcript verbatim --

Q No?

A (Cont'g) Mr. Klein.

Q You corrected me yesterday, you found the error in it when I said, "accountant" which was corrected to "lawyer." You remembered that.

A Some areas I know very well.

Q Yes.

A Yes. You have the transcript, read it.

Q I am not testifying, you testified to this without a transcript on direct examination, is it something about my voice that puts you in a lapse of forgetfulness? Why can't you answer me like you answered Mr. Barlow?

A Because I can't receite the transcripts word for word.

Q Am I failing to give you the cue words or so?

A No.

(At this point Mr. Klein handed a document to the witness and showed him something therein.)

THE WITNESS: Now, what was your question?

Q The question was this (indicating) and the answer is this (indicating) and it's this, isn't it?

A Right. Do you want to repeat the question again?

Q The question is: What response did Mr. La Ponzina make when you said to him: "Write the case off? That's why I wanted to see you. I didn't want any misunderstanding. I felt that if you wanted to do something, you make your own deal. You know what I mean. Um."

Now, what did he say?

A He said: "What do I know about it, Nick. It's all right."

Q THen you went on to say -- what did you say next?

A Could you let me look at that again?

MR. KLEIN: All right.

Your Honor, I feel I'm testifying here, I'm asking and answering.

THE COURT: He doesn't have a recollection. Show it to him or else read it to him.

Q You don't remember what followed that?

A I don't remember exactly.

Q This paper doesn't refresh your recollection, you are just reading it; does it or does it not refresh your recollection or do you read it?

A I am refreshing my recollection.

Q Question by question.

A That refreshes my recollection, I can testify.

Q Does that refresh your recollection about the events of August 8th?

A I can testify to the substance of the conversation, I can't testify word for word unless you want me to read the transcript.

Q I will show it to you. You didn't need the assistance of this crutch when Mr. Barlow was examining you. Down here (indicating).

(The witness examined the document.)

Q Well?

(Mr. Klein then took the transcript back.)

Q You looked at the transcript, you looked where I pointed?

A Yes.

Q And now what did you say after Mr. La Ponzina said: "What do I know about it, Nick. It's all right."

A I said just as long as I know what the story is, I don't want any complaints, I want you to be satisfied.

Q And that came out of your mouth?

A Yes.

Q And is there any response on the tape by Mr. La Ponzina here?

A No, I had said that.

Q And is there any response on the tape by Mr. La Ponzina?

A At that point he whispered something to me.

Q At that point he whispered something?

A Yes.

Q And after he whispered, did you say, "I didn't hear what you said, Ernie"?

A No, I heard what he said.

Q You heard what he said?

A Yes.

Q You knew you were wearing a tape recorder?

A A body transmitter.

Q A body transmitter. You know the difference between a body transmitter and a tape recorder?

A Yes, what I had was a radio transmitter.

Q I thought yesterday you said you knew nothing about it. All right. After you say he whispered, you didn't

try and raise the voice up?

A No, I did not pursue it.

Q You didn't pursue it at all, as a matter of fact you didn't feel that the content of that whisper, if it was made, was important enough for this case?

A I thought --

MR. BARLOW: Objection to the witness' state of mind, your Honor.

THE COURT: No, I will allow it.

A I thought it would be too obvious if I did.

Q Too obvious?

A Yes.

Q You mean at this point you felt that Mr. La Ponzina knew nothing about the bribe attempt and that if you asked him to repeat it again he was liable to think that there was hankypanky or there was -- there might have been a bribe or something; is that right?

A No.

Q Weren't you trying to trick Mr. La Ponzina about these double entendre questions instead of coming straight out and telling him, "Listen, I spoke to Joe, he is going to pay a thousand dollars for you."

Weren't you trying to trap him into this thing here without coming out and saying "bribe"?

A No.

Q Weren't you using questions here which could be misconstrued?

A No.

Q But you didn't want to alert Mr. La Ponzina?

A He is a very cautious man, very wary.

Q And you found that out when? You only met him once before and you used -- is that right?

A Yes.

Q And did you find it out on the time before or this time?

A This time.

Q This time. That he is a very cautious man?

You know, we are still on the first page of what happened. This took place within two minutes of the greeting. Let me just read these few lines to you, the opening:

"Joe said you wanted to see me."

And you will notice I don't turn the page at all, watch my hands.

"Joe said you wanted to see me.

"Yeah, I er - did he talk to you or what?

"He don't talk to me too much, Nick. He said you wanted to see me.

"Well, I wanted to know, Ernie, what your intentions were. You know. What, what did you, what did you want to do?"

La Ponzina's response to you was: "No problem."

"I'm not sure I know what you want to ask me."

There are some questions about:

"Well, what do you want me to do? Discontinue the investigation?

"Yeah.

"Write the case off? That's why I wanted to see you because I didn't want any misunderstanding. You know. I felt that if you wanted to do something, you make your own deal. You know what I mean."

"What do I know about it, Nick. It's all right.

"Just as long as I know exactly what's, what the story is. I don't want any complaints. I don't want problems later on. I want you to be satisfied."

That is right here (indicating), right?

A Yes.

Q The first page, and this is right at the beginning of the conversation. When did you discover that Mr. La Ponzina was wary?

A When he gestured like this (indicating).

Q Where is that on here?

A It is not on here.

Q And at what point did he gesture?

A When I said, "I'm not sure I know what you mean."

Q Before -- all right -- before you said, "I'm not" -- where do you see, "I'm not sure I know what you mean"? Where, where do you see that on the page?

A It comes after he said, "Whatever he spoke to you about, no problem," and I said, "I'm not sure I know what (inaudible)."

Q It says, it says "I'm not sure I know what." Right?

A Yes.

Q And right after that you say he gestured; right?

A Yes.

Q Up to that point you didn't think he was wary? Withdrawn.

At that time when he gestured, that made you feel that he was wary, that is when you discovered he was wary; is that right, his gesture?

A Yes, that solidified that feeling with me.

Q Let's take the questions that preceded the gesture, preceding the gesture, you say to him after he said:

"Joe said you wanted to see me."

He said: "Yeah, I er - did he talk to you or what?"

Were you trying to find out -- Mr. Gentile told Mr. La Ponzina that he had agreed to give you a thousand dollars for Mr. La Ponzina --

A Yes.

Q Is that right?

A Yes.

Q Now at that point you didn't say: "I spoke to Mr. Gentile, you know Mr. Gentile and I have an arrangement, he is going to pay me a thousand dollars to take care of your tax return." You didn't say that?

A Yes.

Q You just said he didn't talk to you; is that correct?

A Yes.

Q It says: "He don't talk to me too much, Nick. He said you wanted to see me."

A Right.

Q Nothing wrong with that answer, is there?

A I don't know what you mean by that.

Q All right. He didn't give you the answer you wanted to get, is that right (indicating)? He didn't say, "I don't know what you mean." I take it your hands mean

something. And then you say -- and we are still before this so-called gesture, you say:

"Well, I wanted to know, Ernie, what your intentions were. You know. What, what did you, what did you want to do?"

You asked him that, right?

A Yes.

(Continued on next page.)

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CROSS-EXAMINATION

BY MR. KLEIN: (Cont'd.)

Q Even there you did not come out and say, "Listen,"-- you didn't come out with a preamble and say, did you, "Joe has offered me $1,000 to take care of your income tax returns, and I'd like to know what your intentions are," you didn't preface it with that, did you?

A I didn't.

Q But if you did preface it with that, then there would be no misunderstanding and you might have gotten some direct answers, maybe that you didn't like, is that right?

A I wouldn't know about that.

Q You started in the middle and you say, "what are your intentions, what do you want to do?" Right?

A Yes.

Q You still don't mention the fact that Mr. Gentile had offered you money, do you?

A No.

Q Mr. LaPonzina says, "whatever he spoke to you about, it's all right," right?

A Yes.

Q Then after that, you say, "I'm not sure what you mean," is that right?

A Yes.

Q It wasn't clear to you there what he meant, right, that's what you told him, "I'm not sure I know what you mean."

A Well, I had to be --

Q Did you understand what he meant -- did you understand what Mr. LaPonzina meant when he said, "Whatever he spoke to you about, no problem."

A It was not clear.

Q That's why you said, "I'm not sure I know what you mean," right?

A Right.

Q So then you tell him after that, there was some gesture, is that right?

A Yes.

Q And then after the gesture, Mr. LaPonzina -- then there is a couple of inaudibles, is that right?

A Yes.

Q Then Mr. LaPonzina says, "You want to ask me some questions about what"? Is that right?

A Yes.

Q And then you say, "Well, that's all. What do you want me to do, discontinue the investigation, write the case off," and you go into that, "I don't want there to be

a misunderstanding," isn't that a continuation of the same type of questions you asked him before you said there was a gesture, there was no change in your tactics?

A It had to be established that Mr. LaPonzina had knowledge, that he was consenting to the bribe.

Q Oh, you know the elements of a bribery case, right? You knew it and that's what you were trying to establish it had to be and that's why you were wearing the Kel transmitter?

A That much I knew.

Q And that's what you were trying to establish, you just told us, it had to be established, and you were there to try and establish it, weren't you?

A Yes.

Q You never told Mr. LaPonzina at that meeting that Mr. Gentile had offed a bribe in his behalf?

A Pardon me?

Q You didn't tell Mr. LaPonzina at that meeting of August 8th, Mr. Gentile had offered you a bribe in Mr. LaPonzina's behalf, did you?

A No. Ididn't.

Q On Page 7 of August 8th, did Mr. LaPonzina tell you Mr. Gentile wanted to see you?

A Can you rephrase that, Mr. Klein?

Q Well, I want to know, during the meeting of August 8th, did Mr. LaPonzina tell you that Mr. Gentile wanted to see you about something?

A What part of the transcript are you referring to, or the conversation, later on in the conversation?

Q How long was this whole conversation?

A In the car? All together, which?

Q August 8th.

A Oh, I would say it was about an hour altogether.

Q Did he tell you that Mr. Gentile wanted to see you about something personal?

A Yes.

Q Do you recall testifying here on the direct by Mr. Barlow -- I'll withdraw that question. Let me ask you, what did he say, what did Mr. LaPonzina say about the meeting?

A Are you referring to what you had just said, right?

Q Yes.

A Okay. He said that, "And Joe also wants to see you on something else personal."

Q It is something else, isn't it, it's not someone else, is it?

A No. In fact I had testified that it was

something else.

Q You testified that it was something else?

A On that day, yes.

Q When Mr. Barlow asked you?

A As it related to that day, yes.

Q You didn't say you want to see someone else, you said it was something else?

A When I was relating to conversation on that day, I said something else.

Q That's right. All right.

A Now, on the 15th, I had said Ihad used the word "someone."

Q What is 15?

A On the 15th of June.

Q We are talking now on August 8th.

A I'm sorry, I mean on the 9th of August.

Q Ninth of August Mr. LaPonzina wasn't there, was he?

A No.

Q So the conversation with Mr. LaPonzina on August 8th is, he said, "Mr. Gentile wants to see you about something else, something personal."

A Yes. That's what he said in fact.

Q Did these words come out of your mouth, "Just

as long as I know exactly what the story is, I don't want any complaints, I don't want any problems later on, I want you to be satisfied." You said that, right?

A Yes.

Q Those were out of your mouth?

A Yes.

Q And do you recall Mr. LaPonzina stating to you, "I'm not saying I, inaudible, a lot of money, believe me when I tell you, now, my wife, is it against the law for her to work in her own house? I won't lie to you, I don't have to lie to you. My wife works. She's in advertising. One year she earned $3,600. I recorded that she earned about 1,600. I charged the phone because the phone is for the business, I charged it like she had an office, a store, an office to pay rent. Is that right, Nick? Is it against the law for her to report that that's rent, is it? I mean I'm asking you, you know better than me, she pays rent for her own house towards the business"?

Do you recall him asking you if that was proper?

A Yes.

Q Then he says, "I don't even know if that's in the law. I believe it is so she's allowed to work out of her own house so my rent was no problem. Is that all right,"

and I believe you said it was, something to that effect?

A Yes.

Q You told him that was all right?

A Yes.

Q And then he's talking about his rent in his house, $240 a month or whatever it is, and so forth?

A Yes.

Q And immediately after you say, "Well, there is no use going into the merits of the case, I mean you and I know where we stand," right?

A Yes.

Q And there is no response made to that, correct?

A I don't recall.

Q But those words came out of your mouth?

A Yes.

Q You want to tell me there is a response made to that on this transcript?

A If you want to show me the transcript.

Q Sure I'll show you the transcript.

A What was your question?

Q Is there any answer to that?

A I don't know, Mr. Klein.

Q I didn't hear you, what?

A I don't know what was said on the other page.

Q All right. But those words came out of your mouth, right?

A Yes.

Q Mr. LaPonzina says, "If I could, if there is anything else you want me to explain about my return," this is all after you talked about the gesture and the whisper, is that right?

A Yes.

Q "Is there anything else you want me to explain about my return? I know they are low, but neither do I live like a millionaire. Nick, a lot of my clothes, my wife makes them, let me tell you, Nick, she makes them, she made these slacks. My wife is a designer. She makes them, believe me, and she does a good job. Anytime you feel you're doubtful, come up to the house and I'll show you," do you remember that?

A Yes.

Q And you said, "No, I don't," you refused the investigation?

A Yes.

Q And you remember he says, "She does work, everything, Nick. I'll welcome you into my home, believe me I will. I don't think you're looking to hurt me, Nick. I mean --" He must have felt you were a square shooter, too.

"I mean I'm not a tough guy, I'm not a wise guy, I don't go around doing anything bad to anybody, nothing at all, believe me, I'm telling you the truth. If you question anybody about me they won't lie to you, they will tell you the truth, I'm not a bad person." Do you remember him saying that?

A Yes.

Q August 9th -- excuse me, the end of August 8th. Remember Mr. LaPonzina saying to you, "Joe's a wonderful person, you know, he's a good friend of mine, he's a hell of a person. If you have the many friends like that in your life, you're a wealthy man, you're a rich man." Then you ask him how long he knew Joe, do you remember that?

A Yes.

Q Let's go to August 9th now. August 9th, Mr. LaPonzina was not present, is that right?

A That's right.

Q And you came in, you spoke to Mr. Gentile, right?

A Yes.

Q What did you say?

A He asked me if I was satisfied with my meeting, and Isaid, yes, I wanted to satisfy myself that this is what he wanted to do and that everything was all right.

Q So then, in other words, Mr. Gentile says,

"Well, so you had your meeting. Satisfied? I don't what the hell you can ask him, but anyway you didn't have to meet him." You say, "Well, I just wanted to." Mr. Gentile said, "It's better for you," then you continue on, he interrupted you, "To satisfy myself that this is what he wanted, that everything is all right." Mr. Gentile says, "Yeah," right?

A Yes.

Q What about that something else that he wanted to talk to you about personal?

A Yes, he mentioned, referring to Ernie, I said, he mentioned that you had something else to discuss with me or talk to me about.

Q "Something else," not someone else, something else?

A Something else, right.

Q Then do you recall Mr. Gentile saying, "Well, I don't know yet. I'll let you know." ?

A Yes. There was something more, though.

Q What. I beg your pardon?

A Wasn't there something more he said?

Q I'll read the rest of it, but I didn't think it was responsive. You know this portion pretty good.

A Not pretty good.

Q You knew thre was something else here.

A Yes.

Q "All the names that you mentioned I'm interested only in one guy," this is Mr. Gentry talking?

A Yes.

Q "I'm interested in only one guy and that's all. I don't try to intercede for anybody because then you get the name. Oh, he could take care of it, Oh, he could take care of this, he could take care of this, and they got me for a contact man, a bag man, everything which is wrong. There is only one guy, but I'll find out first. How is everything? Okay." Is that what you are talking about?

A Yes.

Q That's Mr. Gentile talking to you?

A Yes.

Q You say at that meeting of August 9th, Mr. Gentile handed you $1,000?

A Yes.

Q Did he say to you, did he use the word "bribe"?

A No.

Q Did he say, "This $1,000 is to make you forget about Mr. LaPonzina's tax returns"?

A No.

Q Did he say, "This is --", excuse me. Did he mention Mr. LaPonzina by name?

A No.

Q When he passed the money?

A No.

Q If you saw a man on a fishing dock with a rod and reel and line and hook and sinker and bait on it, he throws it into the water, would you presume that he's fishing?

A Yes.

MR. KLEIN: You can have your witness back, Mr. Barlow.

MR. BARLOW: Thank you, Mr. Klein.

THE COURT: Would you want to take a short recess now and then we will start redirect. All right. We will take a short recess and then start a redirect.

(Jury excused)

(Continued on next page.)

(After recess)

(Jury present)

MR. BARLOW: May I proceed, your Honor?

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. BARLOW:

Q Agent Tsotsos, referring you to your initial meeting with Mr. Gentry, September 8, 1971. Do you remember Mr. Schettino asked you what rights if any, you had advised Mr. Gentile of at that time?

Can you tell us what you did advise Mr. Gentile of on September 8th of that year?

A Yes. I told Mr. Gentile that he didn't have to answer any of my questions and that anything he did say -- at this point he interrupted me and he said "would be used against me," and I said, "Right."

Q And against who -- who, if anybody was with you when you went to meet Mr. Gentile that day?

A Special Agent Peter Farrell.

Q Do you remember Mr. Schettino asked you on cross-examination what the purpose of having two special agents interview a tax payer was? Can you tell us what the purpose of having two agents is?

A The other agent serves as a witness.

Q After September 8, 1971, why didn't you have a second agent with you when you interviewed Mr. Gentile and Mr. LaPonzina?

MR. KLEIN: That's objected to, your Honor.

THE COURT: Yes. Sustained. Bad question.

Q Agent Tsotsos, were all of your other conversations recorded then with Mr. Gentile and Mr. LaPonzina?

A Yes.

Q By the way, I think you had testified on cross-examination that before you went to these various meetings, the Kel set, the radio transmitter was turned on. Was there any time during any of the recorded conversations, after you had gone and met Mr. King, that switch was in the off position?

A No.

Q By the way, was anything said about bribery on September 8, 1971?

A No.

Q Was anything said about bribery November 30, 1971, when you testified Mr. Gentile?

A No.

Q Again referring you to November 30, 1971, remember Mr. Schettino asked you whether or not you had all of the evidence against Mr. Gentile at that time?

A Yes.

Q After November 30, 1971, did you obtain other evidence in your tax investigation?

A Yes.

Q And can you briefly tell us what that was?

A After that conversation I had gone to Mr. Gentile's banks and pursuant to summons had obtained bank statements, bank deposit tickets, transcripts of accounts and photocopies of some checks that had been deposited to Mr. Gentile's accounts.

Q Now, had Mr. Gentile told you where he had his checking account?

A Yes.

Q And what bank was that?

A Manufacturers Hanover Trust.

Q If you know, in 1971 and 1972, did Manufacturers Hanover microfilm copies of their depositors' checks?

A They didn't.

Q By the way, do you remember Mr. Schettino asking you several days ago in how many other cases you had worn a radio transmitter?

A Yes.

Q What was your answer to that?

A None.

* * *

in this world, or something to that effect?

A Yes.

Q Are those the words that Mr. Gentile used in concerning corruption?

A He also said --

MR. SCEHTTINO: If your Honor please, I object. That is not responsive. Secondly, I told this jury I was paraphrasing and I resent any inference that I attempted to mislead this witness.

THE COURT: I will sustain it.

Q Referring then to -- referring again to June 14, 1972, can you tell us what Mr. Gentile -- excuse me, I will make the reference more pointed. Referring you to Pages 8 and 9 of the transcript of June 14th. What did Mr. Gentile say he thought about corruption?

A He said, "Now, I'm not against it providing no one gets hurt."

Q Remember Mr. Schettino also, referring you to the portion of your conversation on June 14th, when you told Mr. Gentile he didn't need a lawyer?

A Yes.

Q Referring you to -- can you tell us in reference to Mr. Gentile asking you, well, if there is any way we can get around it, you tell me yes or no. And

your answer several minutes later, the answer, "Yes, Joe." Was it before or after that that you told Mr. Gentile he didn't need a lawyer?

A After.

Q Also, again referring to June 14, 1972. Do you remember Mr. Schettino reading the portion of the transcript where Mr. Gentile says, "If you've got something on me, subpoena me, take me to the Grand Jury, let me testify," and your answer -- Do you remember that question and the answer?

A Yes.

Q Is that the procedure that is followed in criminal tax investigations?

MR. SCHETTINO: I object, your Honor. isn't what procedure?

THE COURT: What procedure?

Q Is the procedure to have the tax payer subpoenaed to the Grand Jury and testify at this stage of the proceedings, that is, while you were still investigating him?

A That is not generally the procedure.

Q Can you tell us what the procedure is?

MR. SCHETTINO: I object to that, your Honor, as to what the procedure is.

THE COURT: I will sustain it. The reason for sustaining the objection is that he was not foreclosed from taking him if he had wanted to. That would be a true statement, isn't it, if you had wanted to take Mr. Gentile st that time, you could have taken him to the Grand Jury whether the investigation was complete or not.

THE WITNESS: We don't work that way.

THE COURT: You see, I'm not trying to do it one way or the other, I want to keep the record as straight as it can be. You understand that?

THE WITNESS: Yes.

THE COURT: I know you don't work that way.

BY MR. BARLOW:

Q Agent Tsotsos, again referring you to Mr. Gentile's -- Mr. Schettino's question where he read Mr. Gentile's questions, "You tell me if there is a way we can get around this. You tell yes or no," and your subsequent answer. The answer was, "Yes, Joe." What if anything did Mr. Gentile say thereafter.

A He said, "What? Yes, what, that we could get around it?" And I said, "Yes," he said, then you say it's yes. The next thing is,"Now don't get me wrong, no reflection on you because I think you would want to feel

safe, as safe as I am. Remember that. You're talking to an old timer, and I've been through the mill and I've seen a lot of people get hurt. And believe me, I told you, I'd sooner hurt myself than to hurt you."

(Continued on next page.)

REDIRECT EXAMINATION

BY MR. BARLOW: (Cont'd.)

Q And could you tell us how much time elapsed between your answer "Yes, Joe," and the testimony you've just given?

A It was just like that, one right after the other.

Q Also referring to June 14, 1972, do you remember Mr. Schettino asked you whether money was mentioned before you had written the $3,000 on the piece of paper and handed it to Mr. Gentile and your answer was that it had been discussed before?

A Yes.

Q Can you tell us what that reference was?

A After I had asked Mr. Gentile, what he wanted me to do and he said, "Well, what can you do for me, tell me how to get around all this." I said, "Criminal, civil or what, what do you want"? And he said, "Criminal, of course." I said, "You want me to kill it criminally"? And he said, "Yes, I am talking about criminal. Kill it." And I said, "What about the civil taxes"? And he said, "The civil taxes, too. Now, on all this combined, you can do something," he said, and I said "Yes," and he said, "That's the help that I want and that's the help I want and

naturally whatever it is, I don't want to bargain with you."

Q And do you remember Mr. Schettino reading to you a portion of the transcript a little later in the transcript at which point you said you weren't proud about doing this?

A Yes.

Q Can you tell us what Mr. Gentile said immediately thereafter?

A He said, "I am not proud about a bad thing either, but this is not bad, we are not hurting anyone."

Q And do you remember Mr. Schettino reading to you, a subsequent portio of the transcript, just after the portion of the conversation where you discussed the meeting the next day and do you remember Mr. Schettino paraphrasing a conversation by saying that Mr. Gentile said he hoped he was doing the right thing? Do you remember what Mr. Gentile actually said at that point?

A Yes.

Q Can you tell us what that was?

A Yes, he said, "I am always worried about one thing, am I doing business with the right person, that's all I worry about."

Q Did Mr. Gentile ever use that phrase any other time?

A Yes.

Q Now, referring you to Mr. Klein's cross-examination, do you remember he questioned you about your initial meeting with Mr. LaPonzina on June 29, 1972?

A Yes.

Q And do you remember him reading portions of the transcript of that conversation and asking you whether you had ever asked Mr. LaPonzina or ever told Mr. LaPonzina that he had a right to have an attorney?

A Yes.

Q Can you tell us why you didn't tell him that he had a right to have an attorney?

MR. KLEIN: Objection, your Honor.

THE COURT: Sustained. The issue is, he must be advised under the law. is immaterial.

Q In what capacity were you operating at this time, Agent Tsotsos, again referring you to June 29, 1972?

A In an undercover capacity.

MR. KLEIN: I ask that be stricken as a conclusion, contrary to the facts.

THE COURT: Special Agent he said originally. Did you say Undercover now?

THE WITNESS: Yes, I was portraying the role of a corrupt Special Agent.

THE COURT: You were portraying the role of a corrupt Special Agent?

THE WITNESS: Yes.

MR. KLEIN: Your Honor, this is not proper redirect. This is a new element coming into the case now.

THE COURT: Well, I will let the answer stand. That role didn't change from the last three days that you were here, did it, you were still a Special Agent?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. BARLOW:

Q By the way, do you remember Mr. Klein asking you whether you worked in Group 9 of the Intelligence Division in Brooklyn?

A Yes.

Q And are you working in Group 9 now?

A Yes.

Q What is the function of Group 9 of the Intelligence Division in Brooklyn?

MR. KLEIN: I object to what he's doing now. We are talking about 1972.

THE COURT: Yes, whether it was Group 9 in

1972? You were not working in Group 9 in 1972, were you?

THE WITNESS: Group 9 was not in existence at that time.

Q Again referring you to June 29, 1972, do you remember Mr. Klein asking you or reading to you portions of the transcript of that day concerning a discrepancy between Mr. LaPonzina's reported income tax and his expenditures?

A Yes.

Q Can you remember what was said that day by you or Mr. Gentile concerning that discrepancy in Mr. LaPonzina's income?

A Mr. Gentile was explaining to Mr. LaPonzina that what Nick is getting at is that "You report 5,800 and yet you spent 12,000 and he wants you to reconcile or account for that difference."

Q Did Mr. LaPonzina say at that time how he could account for that difference?

A Yes.

Q How could he say he could account for it?

A He said he borrowed it.

Q Did he indicate how he borrowed it?

MR. KLEIN: We are going into the tax case.

THE COURT: I think if I remember the ruling that was not admitted at the time.

MR. BARLOW: You're right, your Honor, but it was in cross-examination --

THE COURT: No, not that part of it. The same ruling is made. I don't forget, Mr. Barlow. I don't take one note up here but I know everything that is on these papers, only experience, it has nothing to do with intelligence, it is plain ordinary mental experience. I am sure you didn't do that intentionally.

Q Now, did you have any communication with Mr. Gentile or Mr. LaPonzina between June 19th and August 3rd, 1972?

A No.

Q Did you have any communication with Mr. Gentile or Mr. LaPonzina between August 3rd and August 8, 1972?

A No.

Q From the time you left the meeting with Mr. LaPonzina on August 8th until the time you met with Mr. Gentile August 9, 1972, did you have any communication with either of the defendants?

A No.

Q Now, referring you to your meeting with Mr.

LaPonzina on August 8, 1972, you testified, I believe, that the gesture of Mr. LaPonzina with his forefinger and thumb does not appear on the transcript in the conversation.

A That's right.

Q He whispered that Joe would give you the money the next day, -- is not audible on the tape recording and not on the transcript also?

A That's right.

Q When did you first report the gesture and Mr. LaPonzina's whisper?

A To Inspector King, immediately after I had seen him that day.

Q Do you remember where you told Mr. King?

A In the area we had rendezvoused at 39th Street between Sixth and Seventh Avenue.

Q Did you thereafter testify about the gesture and Mr. LaPonzina's whisper?

A Yes,

Q Can you tell us when and where that was?

A That was September 27, 1972 before the Grand Jury.

MR. KLEIN: Could we have a page in reference to where that testimony is?

MR. BARLOW: Yes, your Honor, if the Court would indulge me for a second.

* * *

this courtroom and the answer was, no.

BY MR. BARLOW:

Q Agent Tsotsos, did you ever tell Mr. LaPonzina about your discussion with Mr. Gentile positively having to pay about $1,000 for civil tax liabilities after his bribe?

A No

Q Did you ever tell Mr. LaPonzina that Mr. Gentile had given you $3,000 for his tax case?

A No.

Q And again referring you back to June 24, 1972, do you remember Mr. Schettino reading to you a portion of the transcript of that day wherein Mr. Gentile said, "Do your job, do it honestly?

A Yes.

Q Now, did Mr. Gentile ever say that to you after you had shown him the three checks on Government's Exhibits 22 through 24?

A No.

MR. BARLOW: No further questions, your Honor.

RECROSS-EXAMINATION

BY MR. SCHETTINO:

Q Mr. Tsotsos, you told Mr. Barlow that you

were playing a role in this case, isn't that right?

A At one point, yes.

Q You have been playing many roles in this case, have you not, sir?

A No.

Q The other day you told Mr. Klein that you were embarrassed and ashamed to use a certain word, isn't that so?

A To say it in front of the jury, yes.

Q And did it embarrass you when I had to repeat those words that were spoken from your mouth and that were on the tape?

A Yes, it did.

Q But you do know, Mr. Tsotsos, that this jury will hear some other four letter words that may be a lot more embarrassing that were spoken from your mouth, don't you?

A And from Mr. Gentile's mouth.

Q When did you first determine to play the role of a crooked agent?

A After I had been bribed.

Q After you had been bribed?

A Yes.

Q Did you play the role of a crooked agent

on September 23rd?

A No.

Q Did you play the role of a crooked agent on the telephone call of November 26th?

A No.

Q Did you play the role of a crooked agent on June 12th?

A No.

Q Did you play the role of a crooked agent on June 14th?

A After I had been bribed, yes.

Q Now, you told us that you were undercover in this case, is that right?

A After I had been bribed.

Q You were undercover on September 8th -- you weren't undercover on September 8th, were you?

A No.

Q You told the tax payer that you were a Special Agent of the Internal Revenue Service, did you not?

A Yes.

Q Did Mr. King tell you to play the part of a crooked agent?

A He said that after the bribe I should play along.

* * *

Tsotsos, we are talking about the same rights, aren't we, not the rights that your department made up, the same rights that all of us as citizens of this country. Aren't we?

A Yes.

Q And isn't one of those rights to tell someone that is under investigation that they have the right to have an attorney?

A You're absolutely right.

Q Because you know these regulations very well, do you not?

A I certainly do.

Q And did you ever on September 8th or on any other date that you investigated and examined this man, did you ever tell him, he had the right to call his lawyer there?

A No.

Q Now, you also told us -- withdrawn. You remember on my cross-examination, I asked you about the custom of having two agents present during an investigation. Do you remember my asking you that?

A Yes.

Q And do you remember I suggested to you that the purpose of that was to protect both you and the tax payer? Do you remember my suggesting to you that was the

purpose?

A Yes.

Q Mr. Barlow was just asking you this on redirect. You remember that, don't you?

A Yes.

Q Do you remember your answer?

A Yes.

Q What was your answer?

A That the other special agent is there as a witness.

Q Did you have a witness with you on September 23rd?

A No.

Q Did you have a witness with you on June 12th?

A No.

Q Or on June 14th?

A No.

Q Or on any other date other than September 8th?

A No.

Q We are wrong, aren't we, you had a witness, didn't you? Didn't you have a witness?

A What date are you talking about?

Q You had a witness on September 8th, September 23rd and every other date, didn't you?

A I don't know what your definition of a witness is.

Q Well, you had a witness that he couldn't see, that nobody could see, isn't that a fact?

A Yes.

Q Because for some reason of your own, after September 8th, custom was dismissed and now you wanted an unseen witness, didn't you?

A No

Q You never told Mr. Gentile about this other witness, did you?

A No.

Q In fact on November 30th, you specifically told him that there are no other witnesses, didn't you?

A I skirted his question. I did not give him a definitive answer.

Q Have you had experience in playing the part of a corrupt agent?

A No.

Q Have you had experience in playing undercover, as you call it?

A I am not sure in what way you mean that.

Q Well, you appreciate, Mr. Tsotsos, I didn't use the word undercover. The first time I heard it was

five minutes ago on your redirect. You tell me what undercover means?

A Well, it depends on the activity. If you are talking about a surveillance that's one thing, if you are talking about this, it's something else. Now, if your question is, did I ever assume the role of a corrupt agent previously, the answer is no.

Q And your answer, of course, is no, that you never before wore a bug, right?

A Yes.

Q So, is it fair to -- Mr. Tsotsos, for me to assume that non-corrupt agents, agents that are not undercover, they don't wear bugs, is that a fair question?

A I don't understand your question.

Q Well, you told this jury, your explanation to Mr. Barlow was, that the reason you never wore a bug before, because nobody ever offered you a bribe before? Wasn't that your explanation?

A Yes.

Q And --

A I never wore --

THE COURT: That's all. You answered the question.

Q And you also told Mr. Barlow that you

weren't offered a bribe on September 28th. Isn't that correct?

A Yes.

Q And that you weren't offered a bribe on September 23rd, is that correct?

A Yes.

Q And that you weren't offered a bribe on November 30th, is that correct?

A Yes.

Q But the first day, the first day you go to see Mr. Gentile, unannounced, no letter, no telegram, no phone call, you have got this bug on you, isn't that correct?

A Yes.

Q Let me ask you this: On the other investigations, the other 15 or 14, that you have ever gone out during the course of this nine year career of yours, did you take papers, pads and pencils with you?

A Yes.

Q And did you make notes of a taxpayers answers, did you make notes of the data he gave you?

A Yes

Q And that's the normal procedure, is it not?

A Yes, sir.

* * *

MR. BARLOW: He is in the building.

THE COURT: There will be tapes involved so he probably will be subject to recall

All right.

MR. KLEIN: I have about three or four questions your Honor.

THE COURT: Okay

RE-CROSS-EXAMINATION

BY MR. KLEIN:

Q Did you just tell Mr. Barlow you appeared before the Grand Jury and told them that Mr. LaPonzina whispered something to you about Mr. Gentile going to give you the money?

A Yes.

Q I ask you again, when you testified before the Grand Jury did you use the word "whisper"?

A I don't recall

Q Here, here are the Grand Jury minutes.

(Mr. Klein handed the document to the witness.)

MR. KLEIN: Let the record indicate I'm handing this witness the Grand Jury minutes

THE COURT: Mark them for identification if he is going to look at them.

MR. KLEIN: Do you have the original, Mr. Barlow?

MR. BARLOW: Yes.

THE COURT: You can mark yours,

MR. KLEIN: Can I mark mine?

MR. BARLOW: That is another copy of Government's Exhibit 18 for identification.

MR. KLEIN: All right.

I am not offering it in evidence.

MR. BARLOW: No, no.

THE COURT: No, no, for identification only.

We keep a record of what papers are being shown to the witness.

THE CLERK: Document marked for identification as defendant LaPonzina's Exhibit A.

MR. KLEIN: For identification?

THE CLERK: For identification.

MR. KLEIN: Right.

BY MR. KLEIN:

Q Show me the word "whisper".

I direct your attention to pages 15, 16 and 17.

A And your question?

Q Your question is:

Did you use the word "Whisper"?

A No.

Q A moment ago I asked you if you used the word

"whisper" in front of the Grand Jury and you said, "Yes."

Do you recall that answer you gave?

A You were referring to a question Mr. Barlow asked me?

Q I said, did you use the word whisper when you testified before the Grand Jury in this case, andyou said, "Yes," didn't you?

A I wasn't -- I don't know --

Q Did you say that --

MR. BARLOW: Let the witness answer the question please.

MR. KLEIN: I'm trying to get an answer, Mr. Barlow.

A You are directing my attention --

Q No, please --

THE COURT: Did you say it, yes or no?

Q Yes or no, yes or no.

THE COURT: Otherwise say you can't remember. You can say it three different ways, --

Q Don't you remember?

THE COURT: There are three different ways you can answer.

A I think I answered that way to your question, yes.

* * *

Tsotsos-recross

Q You said that you had testified before the Grand Jury and you used the word "whisper": isnt that right?

A No, in answering your question --

Q Let's start afresh.

Do you remember Mr. Barlow this morning asking you:

Did you tell the Grand Jury that Mr. LaPonzina whispered to you?

And you said, "Yes."

Do you remember that answer?

A Then I was mistaken;

Q Do you remember when I asked youthe same question and you said about whispering and you said, "Yes," you were also mistaken; is that right?

A Yes.

Q And if I didn't show youthe Grand Jury minutes, we never would be able to correct that mistake; is that right?

A Yes.

Q You are sure it wasn't a lie?

A I am sure

Q It was a mistake only?

A Yes.

Q And when you told Mr. King --

Oh, just so we have it clear, you didn't use

the word "whisper," when you testified before the Grand Jury?

A That is right.

Q All right.

Now when you told Mr. King, when Mr. King heard the tape of August 8th, youhad a conversation with him -- was Mr. King one of the persons listening to the tape as it was being played?

A You mean during the conversation?

Q Was Mr. King at one of the receivers when you were wired up on August 8th?

A During the conversation?

Q During the conversation.

A Yes, I belive he was.

Q Yes.

And he heard it as it was coming through: is that right?

He heard the conversation?

A He was listening to the conversation, I believe so.

Q Yes, and then after you came out of -- when you finished talking to Mr. LaPonzina you met with Mr. King and you discussed the conversation that you had with Mr. LaPonzina which Mr. King had heard on the tape; is that right?

A Yes.

Q Didn't Mr. King tell you too, There is no evidence of a bribe here, didn't he tell you that?

A No.

MR. BARLOW: Objection.

Q Did you tell him then, Well, you know, Ernie rubbed his fingers together one time and another time he whispered to me that Joe will pay the money.

Did you tell that to Mr. King?

A Yes.

Q Did Mr. King then tell you to make a report, to make a memorandum of it?

A No.

Q Did Mr. King tell you that it was -- that that was important?

A I don't remember.

Q Well, you know it is important. don't you?

A Yes.

Q You knew it at the time, didn't you?

A Yes.

Q And no report was made of it; right?

A Not by me other than oral.

Q I beg your pardon?

A Not by me other than oral. to Mr. King.

Q That is right.

You didn't make any -- you made written memorandums of everything except your meeting with Mr. LaPonzina; is that right?

A Yes.

Q Did Mr. King tell you, We ought to set up another meeting with Mr. LaPonzina so we can reduce these gestures and whispers to something audible that we could hear on the tape.

Did he tell you to go back?

A No.

Q Who had asked you to wear the tape recorder in the first instance, the Kel transmitter in the first instance, Mr. King?

A As a representative of the regional inspector, yes.

Q Did he ever ask you to wear, to wear it again in any other case?

A No.

THE COURT: All right. Any other questions.

MR. BARLOW: Yes, your Honor, I should be able to finish at about five after 1:00.

THE COURT: There isn't much more, this is now re-redirect.

MR. BARLOW: Re-redirect.

Tsotsos-re-redirect

THE COURT: You are pretty much down to the end of the line.

RE-REDIRECT EXAMINATION

BY MR. BARLOW:

Q Agent Tsotsos --

THE COURT: You can't retry the case, all you can go into is questions that have already been asked, it is now narrowed to maybe he can answer two or three questions which you can ask, I dont know what ever else is left.

BY MR. BARLOW:

Q When you testified in the Grand Jury about Mr. LaPonzina's gesture and whisper, had you listened to the tape recording of the conversation?

A No.

Q And on re-cross I think Mr. Schettino asked you something about Mr. Coppa, did ever Mr. Gentile tell you how long he had known Mr. Coppa?

A Yes.

Q How long was that?

A Since he was about 18 or 19 years old.

Q I'm referring you to Mr. Schettino's question about Manufacturer's Hanover Trust, do you know of any regulation that requires you to tell a taxpayer about the existence

* * *

I jump haphazardly into a stipulation on behalf of the defendant Gentile, I would like to again move for the suppression and exclusion of all of the tape recordings in this case on the ground that the prosecutor has proceeded on the theory that no court order was necessary or required in this instance because they were consentual tapes and there were efforts made on behalf of the Government to establish their consent through their witness Agent Tsotsos.

I fefer the Court to page 357 of the transcript in my cross-examination of Agent Tsotsos and I asked the Agent this question:

"Question: Is your consent required?" And the answer was -- the answer of the Agent was: "Yes, sir."

And then I directed this question to the Agent: "In other words, did Mr. King say to you that in this particular investigation he wan ted you to wear this body transmitter and did you have the right to tell him no?"

The Agent's answer was: "This was his request. It was partv of mv dutv."

Then I interjected and I said, "I appreciate that." And then Agent Tsotsos continuing in his

answer says, "As a Special Agent, I didn't have the right to say no."

I respectfully submit to the Court that tape recordings are being introduced into evidence on the theory this is a consentual type of taping, no court order for that reason was required.

I respectfully submit that the People have fallen short of establishing in their case that this agent gave his unequivocal consent to become a party to this taping.

In fact, again, and I repeat myself, his answer was: "I didn't have the right to say no."

I respectfully submit that we don't have the Agent -- the witness who can tell us whether he consented. There is no affirmative statement from the witness to the effect he gave his consent and gave it on a voluntary basis. In fact, he said the contrary. He said "I didn't have the right to say no."

I respectfully submit therefore that the Government has not established his consent and the tape recording should be excluded from the evidence in this case.

MR. KLEIN: I join in the application.

MR. BARLOW: Unfortunately, we don't have the

transcript yet for the 13th. I would agree if that was the only question asked and given as to Agent Tsotsos' consent. However, on redirect Friday, I went into the point again. In fact, it was brought out on recross. Agent Tsotsos said, well, I could have refused Mr. King.

I think he went on to explain his cooperation with the Inspection Division, but upon redirect and on recross the question "Could you refuse" was asked and he said, "Yes, I could have refused."

Then I remember either Mr. Klein or Mr. Schettino saying "What would happen if you refused?" And the answer he gave was, "Nothing." Nothing would have happened. He wouldn't have been wired up. His conversations wouldn't have been recorded.

I think taking all the evidence about the consent that is before the Court and the jury that it is clear that Agent Tsotsos did consent of his own free will. He said, "I could have refused and nothing would have happened."

MR. KLEIN: If the jury feels it wasn't a voluntary consent but part of the duties, then the tape should be exclused because it is not consentual.

THE COURT: I will reserve on this at this time.

MR. KLEIN: I would respectfully move to strike any testimony of this witness and any tapes concerning Mr. La Ponzina on the grounds it expressly appears in the record and from the testimony that he failed to give Mr. La Ponzina his rights.

THE COURT: I'm sorry?

MR. KLEIN: On the grounds he did not advise him of his Miranda Rights.

THE COURT: That is a little more serious than the tape question.

MR. BARLOW: As the Court knows, we are talking about two different kinds of rights in this case. Miranda involves a person in custody and I think it is established from the evidence neither Mr. La Ponzina nor Mr. Gentile were in custody until the arrest in October and until Mr. La Ponzina finally surrendered himself the next March.

The other kind of rights we are talking about are rights which Special Agents of the Intelligence Division give to a person, tax payer, who is under investigation for criminal tax violations. And these rights, first of all, are much less than those rights which accrue under Miranda against Arizona.

The evidence in this case is that when Agent Tsotsos first met with Mr. La Ponzina during the

conversation he told Mr. La Ponzina this was a criminal investigation and I think his testimony was he told Mr. La Ponzina that he had certain --

THE COURT: Those regulations you are talking about, were these merely put into effect to be nebulous or have no meaning or to apprise a citizen of his rights under a criminal investigation?

MR. BARLOW: I would think certainly the latter.

THE COURT: The second would be, if so apprised of his rights, what is the purpose of it? Is it for the purpose of enforcement or for some judicial trial? What would be the purpose? You must have some purpose. You can't have a regulation that says all persons shall be advised of a criminal investigation and they have a right to have a lawyer and they have a right not to make any statements and the statements they make can be used against them and so forth --

MR. BARLOW: I would think, your Honor --

THE COURT: What is the purpose of it?

MR. BARLOW: I would think the rights arised out of the sort of special nature of a criminal tax investigation --

THE COURT: I understand that. I am not

quibbling with you on that.

All I want to place on the record is something to indicate if the administrative agency, which the Internal Revenue Service is, makes a regulation, is the regulation made just for the purpose of placing it on the books without affect or is it intended to have an effectual result?

If you say to a person you are being investigated, you have a right to stand mute, you have a right to have an attorney, once you say you want to stop no other questions will be asked and you have a right not to give us any statement -- and then Mr. Tsotsos says, listen to my questions, what is the purpose of having the regulations if it has no effect in court? It surely can't apply to some judge in the Internal Revenue Service because there are none.

MR. BARLOW: That is true. The purpose of the regulation is to assure that the tax payer knows that what he says to the Agent in connection with the tax investigation could be held against him.

Of course he still has his Fifth Amendment rights at the time and even though he is not a custodial situation --

THE COURT: He has not -- no Fifth Amendment

right when he gets on this stand. When he takes the stand as a defendant.

He was told under an administrative section you have these enumerated rights similar to those in Mirnada. Now he comes into court and has been indicted. He wants a lawyer. He has not been told he was entitled to a lawyer. He can't say now I take the Fifth. Once he takes the witness stand he waives the right of the Fifth.

What is the reason of having an administrative regulation if it has no purpose? Or is it they just want to be kind to the public? And I don't know of anybody who wants to be kind to the public these days much less the Internal Revenue Service?

(Cont'd on next page.)

MR. BARLOW: I am sure it is more than being kind to a tax payer. A tax payer has a Fifth Amendment Right long before he takes the stand, long before he is charged with a crime.

As I was saying earlier --

THE COURT: I assume your answer might have been, Mr. Barlow, if this was a statutory right or case right like in Miranda, that would be evidence it must be suppressed as a matter of law for failure to follow the procedural rights.

This being a regulation, the most it can be is some evidence of his violation of his rights and would be a question of fact for the jury.

MR. KLEIN: Are you going to submit it to the jury?

THE COURT: As a question of fact, being an administrative matter and not a statute -- it is only in violation of an ordinary regulation -- some evidence of a violation. Therefore a question of fact for the jury as to whether or not the violation caused the criminal indictment here.

I think that is the answer to it.

MR. BARLOW: Your HOnor, for the record, even if Agent King doesn't testify I had handed copies of Agent King's 3500 material to defense counsel and his

reports concerning Mr. Gentile and Mr. La Ponzina are respectively marked as Government's Exhibits 27 and 28 for identification. With this one difference, the Court's copy of Government's Exhibit 27, that is Mr. Gentile's case file, contains these pages that the 3500 material given to defense counsel doesn't; page 2, 5, 10, 12 through 14 inclusive, and page 20. The reason being that even if he testified Inspector King would not testify to what is in those pages but the Court has the pages and it might look at them in camera to decide whether it is in fact 3500 material.

THE COURT: All right.

We are about ready to proceed.

Let me read this Lopez case for a minute.

In a matter I just reserved decision, as to whether or not the consent of the agent was voluntary, under the case of United States against Lopez it appears to me that once again it is a question of fact for the jury as to the consent situation of the agent, as to whether or not he freely and voluntarily permitted himself to have a Kell recorder placed on his for the purpose of intercepting conversations between himself and anyone or whether or not there was coercive force by

reason of his position in the administrative position and whether no recourse was left to him.

MR. KLEIN: You are going to bring that out for the jury?

THE COURT: I will put it in my charge.

MR. KLEIN: If they feel there was no consent aren't you going to direct them as a matter of law --

THE COURT: No. Lopez says --

MR. KLEIN: If they find it to be a fact.

THE COURT: United States against Lopez says even under such situations, more drastic situations, they could find some kind of consent and it would be proper.

Okay.

(The jury is in the jury box.)

THE COURT: Good morning, we are ready to start again.

(Cont'd on next page.)

* * *

Q Now, can you tell us what if anything you advised Mr. Gentile on that date?

A I informed Mr. Gentile that Mr. Tsotsos was trying to explain to him his constitutional rights and that part of his constitutional rights consisted of his right to have an attorney present at questioning, to remain silent and to have an attorney.

Q What if anything did Mr. Gentile say immediately prior to your testimony right now?

A Well, Mr. Tsotsos was explaining to Mr. Gentile his rights and Mr. Gentile kept interrupting as though he knew his rights and he preferred to get on with the questioning rather than to hear the full rights that should be given to him.

Q Now, did you ever meet Mr. Gentile again in connection with this investigation?

A No, I have not.

Q Did you ever meet with Mr. La Ponzina, the other defendant?

A No, I did not.

MR. BARLOW: Your witness.

CROSS-EXAMINATION

BY MR. SCHETTINO:

Q Mr. Farrell, were you in the Courtroom when

* * *

Q Where you his superior in connection with this case?

A No.

Q Is there any way that you can tell whether the tape recordings that are contained in those boxes which you were just shown are the same tape recordings that were in the boxes at the time you put your legend on the outside of each box?

A I would have to say no.

Q How many agents were on the surveillance team at any particular occasion when Agent Tsotsos went in wired with the Kel transmitter to take testimony from either Mr. Gentile or from Mr. LaPonzina?

A It varied from 24 and six.

MR. KLEIN: No further questions.

THE COURT: All right. Redirect by Mr. Barlow.

REDIRECT EXAMINATION

BY MR. BARLOW:

Q Inspector King, I think you testified that after you had initialled and put the names on the outside of these boxes they were put in a safe. Can you tell us who has access to that safe?

A Well, the evidence custodian in the office and also, of course, the regional inspector.

* * *

Q Where is your office located, in Manhattan, isn't it?

A That's correct.

Q 90 Church Street?

A 26 Federal Plaza.

Q Right. And you take it out and you bring them over here and give it over ot Mr. Barlow, is that right?

A That's correct?

Q For how long a period of time does Mr. Barlow have them in his possession?

A Well, in preparation for this particular case, he's had them since September 28th.

MR. KLEIN: No further questions.

MR. BARLOW: No other questions, your Honor.

THE COURT: You may step down. We will take a five minute recess.

(Witness excused)

(Jury excused)

THE COURT: That regulation of rights to the person being investigated, was that in effect in 1963 for the IRS, does anyone know?

MR. BARLOW: I'm not sure, your Honor.

MR. KLEIN: Did you say '63, your Honor?

THE COURT: Yes.

MR. BARLOW: I know, your Honor, that Miranda versus Arizona was in 1966, early summer-late spring.

THE COURT: That's the reason why I'm reading Lopez because that was in 1963, and I don't think the regulation was in effect at that time.

MR. KLEIN: Your Honor, I was --

THE COURT: I am trying to determine whether a special charge should be made on it, and I can't follow Lopez because that doesn't guide me at all.

MR. KLEIN: I had one in front of Judge Canella on the advising of Fifth Amendment. Rights by a special agent where he comes in and says, "I'm an investigator,"and that went off on a tangent, but the way I understood the implication of Judge Canella that they would have to do it.

THE COURT: That is statutory. We must distinguish between statutory as opposed to a regulation. A regulation is never a mandatory thing. It can never be explicit of a violation, a regulation, it can only be some evidence of something, that's all. Whether that rule applies in a criminal case is something that I must find out.

(Recess)

* * *

3 Tandberg Recorder number 841, June 12, 1972.

MR. KLEIN: I specifically object to that portion where he says he since compared it, in order to make a complete change.

These fellows, as I understand it, sat in a car, they had a receiver going and a recording device. All they did then was to turn over the tape to Mr. King.

Then they are finished with the case. The rest of it that they are bringing in now is to cure an obvious defect in the chain -- no.

MR. BARLOW: If we are going to have cross-examination as to when they did this thing, then we might as well trhow the stipulation out, and we have the Agents and we are ready to proceed.

MR. KLEIN: All right, put your Agent on.

MR. SCHETTINO: Judge, what bothers me, whether or not we stipulate and I am sure the purpose of the stipulation is in the interest of expediency, what bothers me, Inspector King, under Mr. Klein's cross examination, has admitted that he has no way of telling the Court that the tape that is in this box is the original tape.

He has no way of telling us that.

THE COURT: Outside of marking the outside of

4 of the box.

MR. SCHETTINO: Yes, other than the markings on the box, that he himself has no way of telling us that these are the original tapes.

THE COURT: How about the men who had the original recordings?

MR. BARLOW: That is essentially what the stipulation said.

THE COURT: Are they marked on the tapes inside?

MR. BARLOW: The Government will proffer that the testimony will be that either during the time the conversation was recorded or immediately thereafter the inspectors who were in the civilian's vehicles, wrote on the tape box the date, the number of the recording, the location of the car and the apparent people in the conversations, the length of time of the conversation, the speed, when the recorder was turned on and when it was turned off, dated and signed the box, and then on tape which has been affixed to the tape reel, also identified the conversation -- in this case, the two pieces of tape for Government's Exhibit 2-A, the white tape on the reel indicates, "Tape 1, 6/12/70. Tandberg 841, Special Agent Tsotsos and J. Gentile, 7th Avenue

5 and 19th Street --

THE COURT: So the Agent signed that likewise?

MR. BARLOW: Yes, their testimony would be in preparation for trial they came back into my office, looked at the exhibits and identified both the reel and the box as being the ones they had written on.

THE COURT: Why can't you stipulate that?

MR. KLEIN: I can stipulate to that.

THE COURT: Sure. You can stipulate to that.

MR. KELIN: They came back to his office, they looked at the reel, saw stickers of tape on there and identified it.

THE COURT: That's all we can do.

MR. KLEIN: All right.

THE COURT: Why don't you say it is agreed by and between the Government and the attorneys for the defendant that the tapes which have been placed in evidence, that the agents who were in the vehicles at the time, if they were to testify, would testify that they took the reels from the recorders, marked the outside of the box and marked the tape itself with their initials and the date and the parties involved then turned them over to Mr. King, without conceding the truth thereof.

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6 MR. KLEIN: Correct, your Honor.

MR. SCHETTINO: I will agree to that stipulation.

THE COURT: All right. Is that agreed upon?

MR. KLEIN: Yes sir.

THE COURT: A very simple stipulation.

MR. BARLOW: When it comes time to play the tape recordings, could I just introduce Mr. Kennedy to the jury as the person, the inspector who will be playing the tapes, and briefly tell the jury how they may adjust both the headset and the fit on the head and also adjust the volume control individually?

THE COURT: Yes.

MR. KLEIN: Would your Honor please instruct Mr. Kennedy that during the playing of the tape there is not to be any adjustment on the machine to highlight certain portions?

MR. BARLOW: Of course not.

THE COURT: All right.

MR. SCHETTINO: Pursuant to your Honor's instructions the other day, I assume that Mr. Barlow has deleted from both the written the transcripts, and it will be deleted from the tapes, any reference to bookmaking, shylocking, other matters that we discussed with your Honor the other day.

7 MR. BARLOW: Yes, your Honor. Over the weekend in doing that, there are no such other deletions that have to be made for the November 30, '71 conversation.

There were three pages that I had to change this morning for June 12, and they will be finished in time for the jury to listen to that.

I will go back and do that for the succeeding conversations.

MR. SCHETTINO: I would like, if your Honor please, an opportunity to examine those before the jury hears the tape recordings.

THE COURT: November 30?

MR. SCHETTINO; The November 30th I will accept Mr. Barlow's representation that there was nothing in there that required any deletion.

MR. KLEIN: On June 29, if you recall, that was where you sustained my objection to Mr. Tsotsos going into the tax examination testimony because this was a bribery case.

However, we didn't redact it from the transcript, or take it out of the tapes yet, so all that testimony is in there.

MR. BARLOW: Your Honor, if the Court remembers, the Government has not offered either the

* * *

AFTERNOON SESSION

THE COURT: Before we bring the jury in, on the question of the effect of not giving the right to the defendants by the Special Agent, there is a case, Cohen against the United States, 405 F. 2d, 34, 1968.

I am going to read from page 37 because this involves Judge Lombard of the Second Circuit:

"The Court of Appeals, that have considered the matter since Escobedo, have held, in a variety of fact situations, that warnings need not be given in pre-custodial interview. The reasoning of Judge Lombard in United States against Squeri, 398 F. 2d, 785 (Second Circuit 1968), appears to reflect the views (often unexpressed) of the circuits that have considered the question..."

And then going to page 38: "We reject the view, adopted by a few district courts in other circuits, that IRS agents must give the Miranda warnings, even though there is no custodial interrogation, if the investigation has reached the accusatory stage. The Fifth Amendment privilege prohibits the Government from compelling a person to incriminate himself. It was the compulsive aspect of custodial interrogation, and not the strength or extent of the Government's suspicions at the time the questioning was conducted,

which led the Court to impose the Miranda requirements with regard to custodial questioning. We believe that the presence or absence of compelling pressures, rather than the stage to which the Government's investigation has developed, determines whether the Miranda requirements apply to any particular instance of questioning.'

And on the last page, page 40, Paragraphs 4 and 5: "To summarize, we hold that the Internal Revenue Service agents Revenue or Special, are not required to warn taxpayers who are not in custody of their Fifth or Sixth Amendment rights."

That is the law.

MR. KLEIN: Except what happened here, as you just read --

THE COURT: This is a stronger case. You had better read it before you make argument.

MR. KLEIN: All right.

THE COURT: It is right on point. There is no need to discuss it.

MR. KLEIN: The question before the jury, what about entrapment?

THE COURT: That is for you to argue before the jury.

MR. KLEIN: To show he went out of his way to get answers. If he followed the regulation --

3 THE COURT: There is no requirement, except the requirement, as I understand it from the cases now, the requirement of the regulation was not for the purpose of seeing whether the defendant was getting his rights, a question of whether or not the Internal Revenue Service could protect itself in the event he should have gone further than the accusatory stage and into the custodial stage -- that is the reason it is not a question of fact for the jury.

MR. KLEIN: But your Honor, in this --

THE COURT: I am as new at this as you are. But I want to find the answers.

MR. KLEIN: If that is your ruling, I will obey it. What I was trying to say or ask, do I have to sit and listen to these tapes?

THE COURT: Do you?

MR. KLEIN: Yes.

THE COURT: If you want to protect your client you have to sit and listen to them. I've heard of tapes where some matter had been redacted and it could slip by and go to the jury's ears.

MR. KLEIN: All right, I will sit here.

THE COURT: You don't have to put the headphone on if you don't want to. But you must be in the courtroom because your client is in a joint trial here.

* * *

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(The tape continued playing.)

(Mr. Barlow indicated that the jury should take the earphone from their ears.)

MR. SCHETTINO: Your Honor, may we have a side bar.

THE COURT: Just a moment.

(The following occurred at side bar without the hearing of the jury.)

MR. SCHETTINO: Your Honor, at this time I move for the withdrawal of a juror and for a mistrial on behalf of the defendant Gentile.

This is not the modus operandi that Mr. Barlow originally indicated would be used in listening to these tapes.

Now I have observed that Mr. Barlow gets up and directs this show and he tells the jurors to take off their earphones, and some have been taking their earphones and dropping them down here (indicating at shoulders), and, your Honor, this is where I say this is not the agreement as to how this would work, Mr. Kennedy is leaving the tape in the audible position so that if you take off your earphones and you leave the white button, the button that controls the sound, in its full position, by merely dropping the earphone here (indicating) you hear everything, because I have

done it myself and I have heard everything that is supposedly been redacted from these tapes.

Now this was not what MR. Barlow proposed that he was going to do in having us listen to these tapes, there was a clear understanding that not only would they be redacted physically from the transcript, but that he would either speed it up in such a fashion that there would be no sound coming over the earphones or in some mechanical fashion -- they have that expertise not me -- these words would not appear.

Now I have picked up, by taking my earphones off but by leaving my button in the "on" position and the volume up, and I have heard everything that supposedly was redacted, and I have also observe the members of the jury when Mr. Barlow gives signal, etc., taking their earphones off belatedly.

I submit that it is the Government controlling this machine and Mr. Barlow can't wait until Mr. Kennedy is satisfied with everything and that they have their earphones off, out of their hearing.

I submit now that what we have redacted, well, at this point 50 percent of it has been heard by the jury.

MR. KLEIN: One other thing should be brought to the attention of the Court:

The fact is that in this last hearing the jurors were supposed to have the earphones off, and at least three of them, I counted, had their earphones on while the redacted was being played.

MR. SCHETTINO: Yes.

MR. KLEIN: They heard matter, and I don't know what the matter is, I wasn't listening --

THE COURT: What?

MR. KLEIN: I say I don't know what the redacted matter was but I'm sure it is objectionable otherwise it wouldn't have been redacted.

You are getting stuff into this record here that has been redacted out.

THE COURT: Well, I assumed we would find a little bit of a problem with it.

MR. BARLOW: The Government's position of course is -- and I haven't tried to even listen to the earphones when they have been down on my shoulders -- but I think a simple instruction by the Court when they take the earphones off that they should be down on their lap so that they --

THE COURT: They have been doing that except for this last round.

I will deny it, I will see that they put their earphones down on their laps.

MR. SCHETTINO: Okay.

(The trial then proceeded within the hearing of the jury.)

THE COURT: When you remove your earphones, remove them down from your neck, don't leave them down on your neck, because you can still hear the audible, and you may hear the redacted part which is being played.

Unfortunately, there are some matters in here that you should not hear. It is a question of creating some kind of prejudice, which is what we are trying to avoid as much as we can.

Now unless you follow the rules, you are not going to be fair in your determination at the end of the case, you are just not going to be fair, you are going to put something in the case that doesn't belong there.

You are not to be exposed to surmises or speculate what those portions are, you are not supposed to in any way whatsoever charge anybody with anything but what they are charged with in this case.

There is a very simple issue in this case, the issue in this case is whether or not these men bribed this special agent, the defense in the case is, as you know by this time, whether or not they were entrapped

into doing it and otherwise whether they wouldn't have done it.

Now you will be charged fully on both issues, but those are the two --

MR. KLEIN: Another issue is of knowledge on my client's part.

THE COURT: Knowledge of your client, yes.

The question is whether he knew what was going on in the first place.

Now if you were going to sneak in something which you are not supposed to hear, and not that we don't trust you, but as I told you at the beginning you are just not trained to be able to remove these things from your mind as readily as we can as lawyers. That is the distinction between a lawyer, an advocate and a layman. I know sometimes you think you do as good a job as a lawyer, that is not true because your minds are not trained as our are everyday of the week, particularly mine, and that is to be completely impartial

If I were to sit up here sometimes and think like a layman I wouldn't be able to do my job, I would be unfair, I would be prejidiced, I would be sympathetic, I would be a number of things which I should not be, and I should not wear this robe if I were in that set of mind.

I say this very sincerely, I can't impress upon you how important it is that you keep an open mind until the end of the case and do your job as the Court would instruct you under the law, and do it within your good conscience before the Almighty God so when you walk out of this courtroom, that rear door, you can say to yourselves:

I don't care what anybody says, I know I did right, according to the evidence and according to the rules of law.

If you can't walk through that door at the end of the case and do that, you have not served as a proper juror.

I say that not to be offensive, you know me better now by this time, I don't need to attack anyone, I don't need to irritate you in any way, nor do I have to impress upon you I am sure the most important thing in the whole world and that is that you people in this courtroom must be fair and impartial, and if we can't get that then there is no sense in having this sytem of justice, there would be no sense to it, no sense whatsoever. I know there are some who would like to do away with some of our systems of justice because they have their own preconceived notions.

You must have no preconceived notion in a trial,

you have no right to have a preconceived notion, and that is why we were so careful when I selected you as jurors and the questions that I asked you and I expect each one of you to make up your own mind according to what you heard from the witness stand and not do something that is being sneaked in -- and that is not done intentionally, there is a machine there which we are using and there is a human being operating that machine and we all have human frailties.

It may very well be that at times he is not as quick as he should be, that is not his fault, that is a question of reflexes, it is a question of trying to get it at the time so that you don't hear it.

So we do need your cooperation, definitely.

All right, all right.

MR. BARLOW: Keep them off for a second, please.

Now put them on.

(The recording was then played.)

MR. BARLOW: Take them off again, please.

All right, all right.

(The tape recorder was then played.)

(Mr. Barlow indicated that the jurors should remove the earphones.)

(Mr. Barlow indicated that they should listen

1 MR. SCHETTINO: May we have a sidebar?

2 THE COURT: Take a five-minute recess.

3 (Jury leaves courtroom.)

4 MR. SCHETTINO: If your Honor pleases, I think
5 your Honor knows better than any one of us that I
6 invested six or seven weeks of my time going through
7 redactions and Mr. Barlow made different sounding
8 noises that the purpose was for this to be eminently
9 fair to the defendants and to prevent prejudicial
10 evidence from coming into this case. I submit with
11 this whole mechanism we have had incident after
12 incident where the jury has been exposed and has lis-
13 tened to material that we have redacted.
14 This is under their control. I know your Honor
15 has said that he will tell the jury about redactions,
16 that the inference will be just as much for the
17 Government as for the defendants, but if I have to
18 jump up every five minutes because they do not know
19 how to work the switch, I am clearly going to represent
20 to this jury -- have the jury infer, "What is
21 Mr. Schettino worried about? Why does he have to keep
22 jumping up and down?"
23 I am not saying that it is being done purposely.
24 That is neither here nor there. It is however being
25 done. I do not know how to establish a record other

than for my getting up and saying, "If the Court pleases, this jury has listened to material that has been redacted. They have listened to material that your Honor said they should not hear and I do not know whether we are getting into the record what portions they should hear and not what they shouldn't be hearing."

I say the Government has violated all the terms of their agreement. They have violated every proposition that we spent six weeks here creating. I submit if we do this on one tape, God forbid, when we get to the two-hour and four-hour tape.

I repeat again this was never my understanding that this is the way that Mr. Barlow intended to do this, earphones on, earphones off. I was told there was a mechanical way of stopping this machine with a button and there would be a total absence of sound and then they would put it back on. I want to say for the record, my understanding was so clear on this that I have been joking with Mr. Kennelly for two weeks, and suggesting to him that he keep a steady hand. No one ever told me that the sound would continue.

I respectfully suggest that --

THE COURT: Is there any way to do it without the sound?

THE AGENT: I do not know what you mean --

3 MR. BARLOW: Absolutely none.

MR. SCHETTINO: You can shut it off.

THE COURT: Can you shut off the sound?

MR. BARLOW: You could do it by having the jury turn their earphones off. If they had to turn it back on again, they would not have the sound level adjusted to that which they can hear.

MR. KLEIN: Let me tell you how it can be done: All he has to do is turn the volume off and run it to the appropriate calibration --

MR. BARLOW: Unfortunately, that is not correct. He could get it close, but the nature of the counters on most of these tape-recorders are such that with the speed with which Agent Tsotsos and Mr. Gentile speak, you have probably two or three words or a phrase one way or the other.

MR. KLEIN: I thought this was going to be done mechanically. We have to depend on Mr. Kennedy's reflexes before lunch and after lunch.

THE COURT: What difference does that make?

MR. CHREIN: Before lunch you are more alert when you are hungry.

MR. BARLOW: For the record, neither I or the agents ate much lunch today, except for some chocolate pudding which I had, so we are still alert.

4 The first sidebar that we had occurred when the transcript was in about the middle of page 9 where Mr. Gentile was talking about, "this country here."

The second sidebar, which we are having right now, occurred at page 22.

MR. SCHETTINO: I do not know what difference it makes and why Mr. Barlow is working this out by reference to number of sidebars.

I suggest to your Honor, if I wanted to take the time of this Court, that we'd have 92 sidebars. I still say and what I resent is that I was never told that this was the manner in which the jury would hear this evidence. I was told it was to be the complete contrary.

I now accuse Mr. Barlow and the Government of misrepresenting to me the manner in which these tapes are going to be heard by the jury.

MR. BARLOW: That, your Honor, is exactly what happens all the time I accuse Mr. Schettino of not doing that. We have never told Mr. Schettino nor Mr. Klein to the contrary about the procedures.

MR. KLEIN: He told me about the calibration.

MR. BARLOW: I said it would be necessary for the jurors to take the earphones off.

MR. KLEIN: Can't we make a reproduction and

leave the redacted portions out?

MR. BARLOW: I could give some very good reasons. Actually, there are two:

One, after all the hullabaloo and all of the objections, and rightfully so, as advocates, it is the integrity of the original tapes and the jury deserves to hear the original tapes.

The practical reason is that the original tape-recording is much better, as far as the quality of the sound is concerned, than any of the copies and if Mr. Klein wants to compare his copy with that of the original, he would find the originals are much better.

MR. KLEIN: That is not fair to a defendant in a case. We got a copy. I am relying on what is on the copy. I am surprised by things coming out on the original not in my reproduction. If it is good enough for me, it is good enough for the jury.

MR. BARLOW: That assumes that Mr. Klein did not listen to the original tape-recordings and I might add, his client did also.

THE COURT: At this point there is nothing serious that has gone before the jury.

MR. KLEIN: The jury is getting the idea that there is something sinister left out.

THE COURT: I told them that parts have been taken out in agreement.

MR. SCHETTINO: Just for the matter of the record, and this is bothering me to no end, I have no problem when there is a witness on the stand and testimony comes out of his mouth, the stenographer takes it down, objections are made, your Honor makes rulings. This preserves a record so if somebody decides they are going to appeal, the Appellate Court can read what is down in black and white, but what is bothering me is that I do not know and I do not believe your Honor knows and I don't believe Mr. Barlow knows what this jury is being exposed to, because Mr. Kennedy is not quick enough with the switch or a juror drops an earphone too quickly or picks it up too quickly. I do not know why we went through six weeks of redactions and now we do not know what evidence this jury is hearing.

THE COURT: The readings are all redacted.

MR. SCHETTINO: They are also following audibly with their earphones.

MR. BARLOW: I should hope so.

MR. SCHETTINO: We should have one man from the Government controlling a switch and he is the one that shuts a button off or puts a button on that lets

the jury hear or not hear.

What we have is Mr. Barlow getting up like a schoolmarm and telling them to take their earphones off. I have observed the jurors, maybe due to age -- I do not know -- but some are taking their earphones off slower than the others, and some are putting them back on at the wrong time.

How do I show on the record that Mr. Barlow's monitoring has been incorrect? I am not trying to be arbitrary, but I do have a client to protect. I do not know the outcome of my case, but I will do my darnedest to make a record for him.

MR. KLEIN: If you can't change the procedure, maybe I can suggest that you get an independent expert, not connected with the Government, to run the tape who is familiar with this.

MR. BARLOW: The Government will present its evidence in a way that it deems fit, according to the law that the Court gives.

MR. KLEIN: We are objecting to evidence that was already redacted, coming into the jurors' ears.

MR. BARLOW: Your Honor, I think it is appropriate at this time, talking about things which were redacted coming into the jury's presence, if the Court remembers on the defense's motion the Court

instructed the Government to redact cursewords from both the defendants and Agent Tsotsos from the transcripts. On cross-examination both Mr. Schettino and Mr. Chrein, because it never occurred on direct testimony, both asked Mr. Tsotsos both on cross- and probably re-cross about his references, "shit" and "bullshit."

MR. SCHETTINO: I quoted from the transcript that Mr. Barlow gave to us and to your Honor. I have quoted from that transcript.

I do not think we are under 21. I think it is another ludicrous argument by the Government. Mr. Barlow is concerned about profanity in this case? I am concerned with things more than that. I am concerned that this jury does not become prejudiced with material that has been redacted.

I clearly heard, when I dropped an earphone down, the words, "bookmaking," and "shylocking." I don't know how many other jurors heard it. I heard it. I think it is silly here to start talking about profanity. I do not think there is a juror on this panel that is not over 21.

THE COURT: We will try to work something else out. I do not think any real harm has been done at this point.

(Recess taken.)

* * *

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MR. KLEIN: All right.

(The jury is in the jury box.)

THE COURT: All right. We have it straightened out now. You may proceed.

THE FOREMAN: Will Mr. Barlow tell us when to put them on and when to take them off instead of raising his hand?

THE COURT: Yes, he will tell you now. We have about four or five more times that you are going to take them off. I don't want you to get the impression that he is running the show. Just somebody has to do it and I am completely incapable of handling that myself down there. It is none of my business, number one, so it is strictly within their control. Somebody will have to tell you, and the lawyers are following it with their transcripts, when to take them off. We are trying to find a better way of doing it. We are going to take this one tape this afternoon and maybe by tomorrow we will have a different way of doing it.

Okay.

MR. BARLOW: Now, you can put them on.

(Tape played.)

MR. BARLOW: Would you take them off and will you also turn your headsets off, please.

* * *

THE COURT: Bring the jury in.

(The jury is in the jury box.)

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MR. SCHETTINO: May we have a side bar? There are matters Mr. Barlow and I have been going over.

(The following took place at side bar.)

MR. SCHETTINO: If your Honor pleases, you will recall that Mr. Barlow and I agreed we would review the transcript of 6/12 and 6/14, the two he intends to have the jury listen to so we can come to some final agreement as to what they will hear and what they won't hear.

Referring to the transcript of 6/12, my first reference is to Page Eight and my objection to that portion of the transcript is where Tsotsos says to Gentile:

"You told me or gambling winning in excess of losses, you told me that the first time I came over here."

Now, I object to that going in on several grounds. One, if he is referring to the fact that that statement was made the first time "I came over here," I would assume that reference to 9/8/71, a tape recording which the Government has indicated they don't intend to offer in evidence and there has been no direct testimony on the part of Agent Tsotsos

regarding that conversation.

Secondly, I object to it on the grounds it's got nothing to do with a bribery case. The reference to the fact that a man has gambling earnings in excess of losses, and thirdly, it is a self-serving declaration. Agent Tsotsos is saying Mr. Gentile said this. Mr. Gentile doesn't admit that is a fact.

I would respectfully request that be deleted from the transcript.

Does your Honor want me to go through the entire objection?

THE COURT: One at a time.

MR. BARLOW: As far as Mr. Gentile admitting to it, Mr. Gentile just prior to that portion -- well, I'll read this:

"You told me you had gambling winnings, uh, during the, uh, other years that your, uh, under investigation for.

"Mr. Gentile: Yeah and I reported it.

"Agent Tsotsos: No, I am talking about '68, '69 and '70.

"Mr. Gentile: Yeah, I reported it. Twelve hundred I had one time."

Right after the portion Mr. Schettino read, Mr. Gentile says:

"I, uh, won one time fifty-five hundred."

The Government really thinks it is the state of mind --

THE COURT: Well, I don't see anything wrong with that.

MR. SCHETTINO: My next objection is on Page Nine, Agent Tsotsos says:

"Joe, uh, you report about six thousand dollars, I took an average. I am talking about the years you're under investigation, '68, '9 and '70, you report an average of six grand a year."

Then the conversation goes on:

"Yeah and I spend about fifteen."

Again, I submit, your Honor, your Honor has ruled in connection with the defendant LaPonzina that a question of earnings -- any dispute regarding earnings your Honor took out of Mr. LaPonzina's transcript of the 29th. I would ask on the same reasons your Honor ruled that out, discussions about discrepancies in the income, be taken out of the transcript.

MR. BARLOW: The Government's answer to that is in Mr. Gentile's case it was somewhat different concerning items like this. The Government submits, and I think the evidence shows, Mr. Gentile waited to

see what evidence Agent Tsotsos had. He asked for the checks. He said, "Go to the bank and get the evidence," and the agent finally did. He comes back and sits and waits. He finds out what the case is. And only when he sees how much evidence there is and how good it is, then he decides to make a bribe offer. That puts Mr. Gentile differently from Mr. LaPonzina.

And again, the Government is not submitting this for the truth of it, it is submitting it to show what Mr. Gentile's state of mind was when he was confronted with the charge and two days later with the actual checks.

MR. SCHETTINO: I don't appreciate the logic of that reasoning. The fact that this investigation deals with Mr. Gentile's income, what I think is prejudicial in here, is the agent's statement that he knows or is aware of the fact that Mr. Gentile spends more than he earns. That may be very appropriate in a tax evasion case, but I don't know the relevancy of that in a bribery case.

THE COURT: Well, it may go to the very issue of the bribery because of the first tape. I will allow it.

MR. SCHETTINO: The next reference, if it please your Honor, is Page Twelve, on top of that

page. Mr. Gentile is talking and he makes reference to the fact, talking about Agent Tsotsos' investigation, that he may go to people and people may say I am a racket guy. And, "Whoever tells you that I'm a racket guy, they full of shit."

I appreciate this is Mr. Gentile's dialogue, but I think the reference to being a racket guy is not relevant.

THE COURT: I think I will take that out.

MR. SCHETTINO: And I think if your Honor please, on Page 25, Mr. Barlow and I are in accord that there is some dialogue regarding what time it was and Mr. Gentile gives the time and he says that that is bookmaking time. We agreed on that.

MR. BARLOW: The Court's copy will indicate that is taken out on Page 25.

MR. SCHETTINO: Again, if your Honor pleases, Page 26, they are discussing checks and Mr. Tsotsos says they are not betting with you directly --

MR. BARLOW: Oh, yes.

MR. SCHETTINO: That goes out.

MR. BARLOW: Finally, on Page 27, this is the latter portion, Mr. Gentile in one of his conversations the Government has deleted: I don't expect you to tell you're a shylock -- that has been taken out.

MR. SCHETTINO: What Mr. Barlow is now talking about is Page 27, it involves the matter that I addressed myself to to the Court by way of my oral motion. When I asked your Honor to strike out that portion where Tsotsos says: Joe, I know you are the banker -- Mr. Barlow and I agree that the conversation that comes after that regarding bookmaking, shylocking, I would renew my motion that that statement on behalf of Tsotsos -- "I know you are the banker -- " I ask that be stricken. That is highlighted by the fact that your Honor has permitted over my objection -- but you said you would reserve on it -- you permitted Mr. Barlow to introduce into evidence three checks. Throughout this transcript of June 12th and again on June 14th, there is reference to checks and there is reference to Mr. Gentile's operation.

I respectfully submit that if these checks remain in evidence that the jury is not going to look at the checks as a question of hidden income because I think the checks in their total sum amount to fourteen hundred dollars. I think the clear inference to the jury is going to be that these checks represent the checks of proceeds from some sort of illegal activity.

I object to their introduction and I renew my

objection that they serve no purpose in the case. We are not trying an income tax where we are determining Mr. Gentile's net worth, and because the tapes contain many, many references to checks and as to how the checks were collected --

MR. BARLOW: Again, as I said on a previous motion, the Government contends the reference about banker -- and I am not going to refer to banker that much -- is the fact that this again is what Mr. Gentile is confronted with. He says on June 12th, well, if you have these checks why don't you show them to me. The agent shows him the checks. Mr. Gentile says, "I can get an affidavit from this guy and that guy." The agent says that is not good enough because you end up with the money.

Mr. Gentile begins the bribe overtures and the Government submits this is the reason why Mr. Gentile changed from saying well, I can get around it this way or that way to the way they actually did get around it.

MR. SCHETTINO: Except Mr. Barlow has left out an important sequence here. When the checks are brought up, the agent continues to say: "Joe, we know how you got these checks. Joe, I know all about your operation.

I say that clearly suggests to this jury that these checks represent a form of illegal activity.

I don't think the Government needs that. There is enough in the transcript without reference or inferences to the fact there may be something nefarious regarding these checks.

MR. BARLOW: The proffer is you are always talking about something nefarious when you are talking about hiding income.

THE COURT: It might not be related to the bribery per se, but it has a secondary reasoning for paying the bribery --

MR. SCHETTINO: The checks that are in evidence--

THE COURT: I don't know whether it is so.

MR. SCHETTINO: I don't quarrel with the money, that is the key to the bribery, but to put into evidence three checks when the agent says he has fifty checks, why bring in three checks?

THE COURT: That is true too.

MR. SCHETTINO: It seems to me it is done for one purpose.

THE COURT: I will continue to reserve on that.

(The following took place in open court.)

MR. BARLOW: Excuse me, your Honor. May I consult with counsel for just a second?

* * *

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(A recess was then taken until 11:55 A.M.)

MR. SCHETTINO: If your Honor pleases, I think I have made it clear to the Court my position on making an objection while the jury is listening to the tape recording --

THE COURT: Yes.

MR. SCHETTINO: Now this morning I asked Mr. Barlow for an extra copy of the transcript of June 14th so that Mr. Gentile could follow it, and as both Mr. Gentile and I were listening to the transcript, I followed on my transcript, and Mr. Gentile followed on his, when we got to page 14, Mr. Gentile --

MR. BARLOW: 24, I think, for the record.

MR. SCHETTINO: Page 24.

Now, Mr. Gentile called to my attention a discrepancy that existed between the transcript that Mr. Barlow handed me this morning and the transcript that I had been following, and the transcript the jury has.

I then went and checked the original transcript that I was furnished when I first started this trial, and the notations I made when we were trying to go through our redactions.

Now, on the transcript of June 14th that Mr. Barlow has given to the jury, and on page --

THE COURT: I don't have a copy of that, I have

been following it on the original transcript.

MR. SCHETTINO: I think the matter that is in dispute, your Honor, and this is a sentence in the transcript that the jury has, and these words appear, and this is Mr. Gentile talking:

"I have a lot of pinches, all dismissals."

Now, on the transcript that Mr. Barlow gave me this morning for Mr. Gentile's use, that entire sentence regarding, "I have a lot of pinches, all dismissals," has been redacted.

It appears on my original transcript in my notations that that is out.

Now, I realize that for six weeks we have gone through argument about what is in and out, and I have transcripts that are marked up, and some of which I can't even read --

THE COURT: What page is this?

MR. BARLOW: 24.

THE COURT: On the original?

MR. BARLOW: Yes, sir.

MR. SCHETTINO: Yes.

THE COURT: Where is that?

MR. SCHETTINO: On page 24, if it please the Court, I think that page ends with the paragraph where Mr. Gentile is talking, and it is the last sentence of

Mr. Gentile's conversation.

THE COURT: I don't have that.

MR. SCHETTINO: Your Honor doesn't have page 24?

THE COURT: No, page 24, but it doesn't say that.

MR. SCHETTINO: Yours does not say that?

MR. BARLOW: Your Honor, I believe we are talking about --

(Mr. Barlow at this point conferred with the Court at the bench proper.)

Your Honor, it is the last sentence here, where it begins:

"I have a lot, er, of pinches, all dismissals."

THE COURT: It is not stricken out on mine.

MR. SCHETTINO: No, your Honor?

May I then have marked for identification page 24 of the transcript that Mr. Barlow has given to the jury.

MR. BARLOW: I believe that will be Defendant's B, as in Boy.

THE CLERK: Yes.

MR. SCHETTINO: Then, if it pleases the Court, I should like to have marked for identification page 24 of the transcript that Mr. Barlow handed me this morning.

THE CLERK: Which is B.

MR. SCHETTINO: This is the first one, that will be B?

THE CLERK: Yes.

MR. SCHETTINO: Now, if your Honor pleases, what I respectfully submit has happened here is that the defendant's prior record has come into this trial without this defendant having taken the stand.

I have a clear and distinct recollection that this was agreed upon that it was out. The transcript that Mr. Barlow furnished to me this morning shows it out.

I would like the Court to appreciate, I would like the record to understand that the various revisions that Mr. Barlow went through were handed to us on the day of this trial, certainly without any opportunity to compare what we had agreed the jury should hear, and what the jury would not hear.

Now I respectfully submit this is not an inadvertence, that it is prosecutorial misconduct on Mr. Barlow's part that the jury has heard this.

THE COURT: I have a recollection as to this whole thing, the Government wanted it, and the defendant Gentile wanted it out, and then it was withdrawn, the objection was withdrawn, evidently.

Here, I have it in my own handwriting (Indicat-

ing).

MR. SCHETTINO: I have no such recollection, if your Honor pleases.

THE COURT: Here (Indicating).

I have written "W.D." in my own heiroglyphics, which means Withdrawn.

The black part is the part that was in dispute, and evidently there is no line through that part when I was ruling on it.

MR. SCHETTINO: Well, if your Honor pleases, I don't know whether or not we have a record on this, but I am looking at the copy that your Honor has shown to me --

THE COURT: Yes.

MR. SCHETTINO: And I assume your Honor has just put the parentheses around --

THE COURT: I just did that in pencil.

MR. SCHETTINO: That was just done at this point?

THE COURT: That was done in pencil just now, the ink, the "Withdrawn," and the lightning shot there through "in," and "out," and then I put a "W.D.," that was done at the time I made my ruling.

MR. SCHETTINO: Well, I respectfully say to your Honor, I have no recollection of that, because certainly I would not withdraw it.

THE COURT: You have to look at the record, because I wouldn't put it down unless that was done.

MR. SCHETTINO: I certainly, I certainly would not do that.

THE COURT: You look through these, and you will find everywhere that I made a ruling, you will find that the Court has written something down, for instance, if you look at page 31, the original, you will see certain things where I wrote, "out," and where I wrote, "allowed," and the lines going through it.

I made a record of everything, I don't depend on stenographers any more, I don't depend on anybody, with all due deference, I don't depend upon anybody any more. I know what I am doing, I have said this a million times, I know me, I just don't depend on people any more.

MR. SCHETTINO: Except, if your Honor pleases, it still appears to me that it is significant that Mr. Barlow -- and I will be glad to show your Honor Exhibit B --

THE COURT: Somebody may have had second thoughts about it, but I wasn't apprised of it.

MR. SCHETTINO: Except, except, your Honor, what your Honor has shown me involves the entire paragraph. Mr. Barlow submitted to me page 24, showing the entire paragraph, however, with the omission of that one sen-

tence, "I have a lot of pinches, all dismissals."

Now there may very well have been discussion in your Honor's chambers as to the major part of that paragraph --

THE COURT: We will have to search the minutes.

MR. SCHETTINO: There was a withdrawal, but I submit this cannot be coincidence.

THE COURT: All rulings that were made were also placed on the record.

MR. BARLOW: Your Honor, I don't believe that our conferences back in chambers during, I guess, late October and early November, have ever been typed up.

THE COURT: They may not be typed up, but the minutes are there.

MR. BARLOW: Certainly the minutes are there.

THE COURT: Minutes were made.

MR. BARLOW: When Mr. Schettino is finished, I have several things which I want to put on the record.

MR. KLEIN: Could we look at that record of that day?

THE COURT: He said they weren't transcribed.

MR. KLEIN: We have had a Reporter every time.

THE COURT: I think these start from the date of trial.

MR. BARLOW: Yes, your Honor, we have everything

that happened in the courtroom, I think, with all the prior hearings and calendar calls before the trial typed up, but I know the Government has never ordered to have typed up the conferences back in chambers.

MR. KLEIN: There was a Reporter each time?

MR. BARLOW: Oh, yes.

MR. KLEIN: There was a Reporter, all we have to do is get the Reporter.

He can read it from his notes.

THE COURT: October 21st, let me see.

MR. SCHETTINO: Do we have October 21st?

MR. BARLOW: Yes, but that is not there.

MR. KLEIN: We had that taken.

That was the day that we had the vocalist.

THE COURT: I have the hearing.

MR. SCHETTINO: If your Honor pleases, may I tell the Court what my recollection is of that particular paragraph?

THE COURT: Yes, sure.

MR. SCHETTINO: That we did discuss the question that particular sentence, "I have a lot of pinches, all dismissals," and that when Mr. Barlow agreed that this not be in the transcript, I then withdrew my objection to that paragraph, so I think your HOnor's note is accurate in that respect.

THE COURT: Could be.

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MR. SCHETTINO: And I say that is substantiated by the fact that this morning Mr. Barlow handed me page 24, in which that is totally redacted from the transcript.

THE COURT: I am not disputing with you, but unless I can see it black and white -- I am not saying that is not so, I don't know.

MR. SCHETTINO: I think the severity of it is in that this defendant's prior record is in evidence now.

I don't know how Mr. Barlow would explain this, I didn't do this redacting, I didn't print this, and how he hands me one this morning in which coincidentall that one particular sentence is missing, and everything else is in -- which again is a substantiation that when he agreed to take it out, I said to your Honor, "I withdraw my objection to the rest of the paragraph."

THE COURT: What do you have in yours, Mr. Kennedy, what do you have in yours?

MR. SCHETTINO: I submit, Judge, Mr. Kennedy has the same transcript, I assume, that Mr. Barlow has given the jury.

AGENT KENNEDY: Page 24?

THE COURT: Yes.

Do you have it redacted from yours, do you follow the original?

AGENT KENNEDY: It is in here, I have the original with everything.

THE COURT: You have the same page that I have?

AGENT KENNEDY: Yes, your Honor.

MR. BARLOW: Yes, your Honor.

MR. SCHETTINO: Can I see it?

THE COURT: I am going to reserve until we get the minutes.

MR. BARLOW: I may have something that may reflect the date.

Your HONOR, I would like to put several things on the record about this, also.

MR. SCHETTINO: Judge, I would like to point out one other matter, and again, I don't know what we do about these things, the damage gets done, and I again suggest that Mr. Barlow controls, and I don't, the Government types these things up, they are in control of it, there is a conversation on June 14th, the tape the jury is now hearing, and I have noticed in reference to that that the jury, and I am not being critical of this, they tend to read ahead, I suppose to see what is happening, but there is a reference in here to the fact where somebody says, "Other wise good people don't go to jail."

Do you have the page on that?

MR. KLEIN: Yes.

Yes, on page 30, page 30.

(Mr. Klein then handed Mr. Schettino the page.)

MR. SCHETTINO: Your Honor, on page 30 of the June 14th transcript, about the middle of the page, Tsotsos says:

"A lot of other wise good guys go to jail, you know."

Now I call your Honor's attention to the fact that there is a space between "other" and "wise," and then when the question is repeated again, or the statement is repeated by Tsotsos:

"A lot of otherwise good people" -- And there is no space between "other" and "wise."

Now, obviously, you read this, and the jury is doing both, they are hearing and reading in the one instance, and because of this space that they leave there, and they are reading, they think they are talking about wise guys, crooks, gangsters, hoods, and that certainly isn't what either one of them said, they were using the word "otherwise" together.

Once again I respectfully suggest that the Government is controlling this, that they are preparing the transcripts, they have control over them, they are reviewing them, and that's what the jury is hearing.

I think, if it please the Court, when you look at the totality of this thing, the reference made in this trial to Attorney General John Mitchell, the interjections, and I say it is an interjection, and they speak in these transcripts regarding the fact that Mr. Gentile had arrests, all dismissals, this is bringing forth to this jury's mind, Who is this man? This must be some big, important fellow.

Now, I will stand and stake my reputation -- If I made that kind of a mistake, I should turn around and walk out of this courtroom -- that I withdrew my objection based upon his representation that that sentence was going out of here.

THE COURT: Well, we need the minutes.

MR. SCHETTINO: I will be glad to do that.

I wonder by what miracle does he hand me this morning a transcript with that sentence missing, Mr. Barlow can't be that clairvoyant.

THE COURT: He said he is going to answer that question, so let us hear it.

MR. BARLOW: Well, first of all, I don't think the Exhibits in the case at this point reflect that in addition to the complete transcripts of the conversations which were given to defense counsel, and the Court has Government's Exhibit 3, which is the complete tran-

fore the Court and argued these changes. The record should also reflect that contrary to what Mr. Schettino has said about the evidence always being in the Government's control, that after the argument, and the Court ruled on the disputed portions of the transcripts, those transcripts -- and I am speaking specifically of the one the Court had right now, Government's Exhibit 3-A, have either been in the Court's possession or in the Government's possession, readily available to the defense counsel.

I think the Court several times has told defense counsel that during the lunch hour some time they had better go ahead and see whether they had the complete transcript, or if something is missing, or something changed.

So it is not as Mr. Schettino has said, he has had available to him either from my hand or from the Court's hand that copy, and I submit that defense counsel just hasn't done all its homework --

MR. SCHETTINO: Judge, let me --

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(continued on next page.)

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MR. BARLOW: I have no clear recollection of what was said on the day that the objection was withdrawn, and the Court marked on page 24 of that transcript, so we will have to wait and see what the minutes reflect.

MR. SCHETTINO: Let me just now at this time make the record, Judge, crystal clear, because Mr. Barlow has been now very forthright with the Court, and Mr. Barlow has just got through telling your Honor that back in October or November, whatever it may be, he handed me page 24 of --

MR. BARLOW: No --

MR. SCHETTINO: (continuing) -- of the transcript of June 14th of the transcript in its entirety, and that page 24 concurs with Defendant's Exhibit C, which omits the reference to Mr. Gentile being pinched, and "all dismissals."

Now I hope Mr. Barlow is now not trying to argue with your Honor that when he got that magnanimous, that I then went back into your Honor's chambers, and I said, "Judge, this is stupid, I want it back in the transcript, the fact that Mr. Gentile has been pinched," because that in effect is what he is telling your Honor because he now agrees and concurs that this Exhibit C that he handed me this morning, that this is not a mistake, this is what he handed me back in October, and that what we

quarreled about was the paragraph in its entirety, and we discussed it with your Honor, and I said, "Fine, I will withdraw it."

The vice of what he has done is that he put it back in and decided to add one more sentence to it. Now I wouldn't care if it were a sentence which had to do with Mr. Gentile taking a tript to Miami or buying somebody upstairs a layout, but the sentence he decides to put in is, "I have a lot of pinches, all dismissals." But it never appeared that way in October when he redacted it.

MR. BARLOW: I, for one, your Honor, am going to wait until we get the minutes of that day, and I know the Court will.

THE COURT: I will reserve at this time, I think we should wait.

I don't recall it.

MR. SCHETTINO: Well, if your Honor pleases, when you said you sare going to wait, well, I have made my statement, and that statement leads up to the fact that I now move for a mistrial on the grounds that this is not an inadvertence, and that the Government here is guilty of misconduct, and I move for a mistrial.

MR. KLEIN: Let the record indicate that the defendant LaPonzina is not joining in the motion.

The only thing is, your Honor, that I have listened with attention, I didn't hear Mr. Barlow explain why he made two versions of that redacted statement, I didn't get the explanation, if one was given.

MR. BARLOW: I didn't, but I think if Mr. Klein will remember, and I know the Court does, that after I brought in the initial redactions, as a result of much discussion and much dispute over portions, that the final redacted copy that the jury has now is quite different, and I for one have spent many long evenings cutting and pasting and taping and Xeroxing again --

Your Honor, there is one, there is one change that Mr. Schettino and I do agree on, and I think we should just put it into the record.

I am referring to page 130 of the transcript, it is during Agent Tsotsos' direct examination, where he is talking about Mr. Gentile, and the transcript says:

"And Mr. Gentile said, 'It's more important for you to know these things, coppa, in other words, coppa cannot be honest...'"

I am sure the Court remembers, and Mr. Schettino and I agree, that what Agent said was, "A cop," in other words, a cop cannot be honest, since he refers to Mr. Coppa with a broad "O" as in hop and pop, and not the

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would be faster, and some slower, so there might be one original that we have gone through.

I went back to see if tape 2 provides a continuous thing, and that does not.

If the defense wants, I will go back and check the originals, and we'll see.

MR. SCHETTINO: I won't accept, "the usual."

I want to know if there is a total void in the conversation, and if so, I would ask your Honor, respectfully, that the jury then be given advice as to what happened -- that they ran out of tape; that they had to change it. They lost all of this conversation, and started at this point (Indicating).

MR. KLEIN: Why don't you insert the words, "Joe, I want you to give me a bribe," and Joe says, "Never, never, never"?

MR. SCHETTINO: Which could have well happened.

MR. BARLOW: Factually, I cannot take a position until I go back and rerun the other three first tapes.

THE COURT: Do you want to wait and see what he does with the first tapes?

MR. SCHETTINO: Is Mr. Barlow speculating, or do they know?

MR. BARLOW: I do not know.

MR. SCHETTINO: Then again, Judge, if he is sug-

* * *

don't know because I don't know.

MR. SCHETTINO: I guess I made my motion.

THE COURT: That's all you can do.

MR. SCHETTINO: I made a complaint on the record.

THE COURT: We will have to determine whether it has any prejudice in this case.

MR. BARLOW: I handed the Court the original and defense counsel copies of the Government's memorandum in opposition to Mr. La Ponzina's motion to elect either Count Three or Count Four and dismiss the others.

Also for the record, Mr. Klein gave me a copy of a trial brief that apparently was made up before the trial. I learned from the Court's law clerk that the defendants have submitted requests to charge. I would ask the defense at this time for copies of any legal papers they submitted to the Court.

MR. KLEIN: Yes.

MR. SCHETTINO: I have not submitted anything so there is nothing I can submit to Mr. Barlow.

MR. KLEIN: May the record indicate I have just given it to Mr. Barlow.

Your Honor, I hope you feel better today.

THE COURT: I didn't give it any thought at this

moment till you just woke me up to it again.

MR. KLEIN: I'm sorry. I would invite your Honor's attention to United States against Accardi 347 U.S. 260, 1954, a case in the United States Supreme Court. That case held that when an agency of the Government did not observe the rules, regulations, or procedures which it has established, that constitutes a violation of the due process clause of the Fifth Amendment. I am not talking about Miranda. I am talking about straight due process. That applies when you are in the accusatory stage.

Now, in 1968, the Internal Revenue Service announced in press release IR-949, the following policy: On first meeting with the taxpayer Special Agent must identify himself as such, describe his function and advise the taxpayer that anything he says may be used against him. The taxpayer must also be told at the initial meeting with the Special Agent that he cannot be compelled to incriminate himself by answering any questions or producing any documents and has the right to seek the assistance of an attorney before responding.

The way I feel about it, a Special Agent gives the interview, it changes from investigative to one that is accusatory. He has to be given his right

pursuant to that regulation. And if he doesn't -- if he doesn't give the taxpayer his right, anything developed on the interview has to be excluded.

I believe your Honor said in the case the other day, the Miranda rights say you have to be in custodial --

THE COURT: The one the other day was involving Internal Revenue rights. It had nothing to do with Miranda.

MR. KLEIN: Well, I called it to your Honor's attention.

THE COURT: All right.

MR. KLEIN: You're not taking argument on that memorandum Mr. Barlow just submitted?

THE COURT: No.

All right, ready?

MR. BARLOW: We are ready to continue with the case.

THE COURT: Bring in the jury.

(The jury entered the jury box.)

THE COURT: All right, good morning, ladies and gentlemen.

MR. BARLOW: Your Honor, again for the record, we will be beginning at page 40 of the transcript of the 14th.

* * *

of them and that will be where page 25 would have been. That page has been deleted but you will hear a portion of the conversation pertaining to that page.

(Tape played)

MR. KLEIN: May we approach the sidebar for a moment?

THE COURT: Yes.

(Sidebar discussion)

MR. KLEIN: Your Honor, page 15, the last paragraph, the bottom of the page you ruled was out.

But, Mr. Schettino's transcript has it in.

What about the jurors?

MR. BARLOW: No, theirs do not.

THE COURT: It is out, isn't it?

MR. BARLOW: Yes.

(Tape played)

THE COURT: Turn to page 26.

(Tape played)

THE COURT: Now, the last part you heard, that you don't have a transcript for. It is for you to decide whether you understand what [illegible] is all about.

We will take -- is the next one long or short?

MR. BARLOW: We have some short ones.

THE COURT: Would that be the end, then?

* * *

4 the jury to decide without that aid because that would program their thinking and so the jury just heard the tape without the transcript. That's all that Mr. La Ponzina heard. Then the jury is not even entitled to more.

And I say at this time, at this belated, tardy motion, it would certainly be prejudicial to Mr. La Ponzina. They have already heard all of the tapes. Now you are going to give them one piece of evidence.

THE COURT: No. I am going to let my decision stand.

MR. BARLOW: In that case, your Honor, the Government rests.

THE COURT: Motions by the defendants.

MR. SCHETTINO: If your Honor please, we still have one matter that hasn't been resolved.

Your Honor will recall that in connection with the transcript of June 14th, there was a dispute as to one sentence concerning a dialogue of Mr. Gentile on page 24 of that transcript.

Now, I maintain, if your Honor will recall, that Mr. Barlow submitted two different versions of that transcript to me on the date that the jury was to hear that. And the transcript or the page that I am

referring to in my -- and my particular objection was to the sentence that reads, "I have a lot of pinches, all dismissals."

Now, I respectfully submit once again to the Court that I reviewed my notes and Mr. Klein is accord with me that that particular sentence was agreed in your Honor's chambers to be stricken.

Your Honor has shown to me your notes wherein you had an indication that there was an objection that was withdrawn. And again in reviewing my notes, the reason that the matter was withdrawn, there was an objection to the entire paragraph -- to the entire dialogue of Mr. Gentile. In your Honor's chambers we agreed that reference to the fact that he had pinches and that they were dismissals would be deleted. And that on that basis I withdrew the objection to the paragraph.

Now, I respectfully submit, as I argued before your Honor, Mr. Barlow originally handed me page 24 with that particular sentence redacted. Now, miraculously on the day that we listened to that tape, he submits the same page with the sentence back in it. And again I know that your Honor has directed that the minutes be examined so that we can come to a determination with more certainty as to what happened.

6 THE COURT: Has anyone examined them? The minutes?

MR. BARLOW: No, your Honor. The minutes were never transcribed. I said the date -- the outside date as to which the conference in chambers occurred. And that's as good as I can get it.

Mr. Schettino is at much at liberty to go to the reporter as I and find out where it is.

MR. SCHETTINO: Well, if your Honor please --

MR. BARLOW: I left it to him.

MR. SCHETTINO: If your Honor pleases, I don't think it's a question of what I am at liberty to do. I think the Government owes the Court an explanation as to why this was submitted to me, a page 24 of the transcript of June 14 for eliminating that sentence, and then when the jury is sitting to hear this particular transcript, that sentence appears. I don't believe it's incumbent upon me to go out and search out the reporter and reconstruct the -- I am telling your Honor as an officer of the Court that that was my recollection. And I think as I argued with your Honor the other day, I hope the Court would not think that after that is redacted that I would come back to your Honor and that I would volunteer that you should put into this tape the fact that Mr. Gentile has been

pinched and they are all dismissals.

THE COURT: I don't think anything of the sort, except I can only go by my own notes to say that it was withdrawn. I have no other recollection. That's why I asked one or the other side to get the minutes. Show me the minutes. I will be glad to do what I am supposed to do. But I am not going to search the minutes. It's not up to me to search the minutes.

MR. SCHETTINO: I respectfully submit, your Honor, unfortunately the jury has heard the tape-recording based upon the transcription that Mr.Barlow has furnished to them.

THE COURT: The only way you can correct the -- you may search the minutes and show the Court that that part is not supposed to be in there. I am not going to do that work. It's not incumbent upon me at all. All I have is what I ruled on and it was withdrawn. That's the end of it. If some portion was left in -- I don't have it scratched out in my notes. I don't have anything on it except withdrawn.

MR. SCHETTINO: Well, if your Honor please --

THE COURT: Whether he gave you two different writings, that's between you and he. That doesn't bind the Court one bit.

MR. SCHETTINO: Except I am going to leave my

8 argument in this fashion. I did not prepared these transcripts; the Government did. And I am going to conclude this by saying that I think the burden is upon the Government as to whether this was an inadvertance or whether this was purposely put back into the transcript. An d I have my objection before your Honor that that particular sentence, that statement that the jury heard was extremely prejudicial. It goes to the gut and character of this witness.

THE COURT: But I cannot come to that conclusion unless you show that I failed to strike it out at the time it was withdrawn.

MR. BARLOW: Your Honor, I can --

THE COURT: You are asking me to make a conclusion based on what someone else did. I am not going to do that.

MR. BARLOW: As to inadvertance or deliberateness, your Honor, I can clear it up in Mr. Schettino's mind right now. I prepared the final redaction which the jury got. In this case, Government -- in this instance, Government Exhibit 3-A, which the Court has in front of it. That's the complete transcript that was marked. And I have no clear recollection of what happened as to that particular portion that day.

MR. SCHETTINO: Judge, I am not trying to put

9 the burden on your Honor.

THE COURT: The only way -- I don't know why you continue to argue. The only way for me to clear it up is getting the minutes of the date that I had this in chambers. I don't have the minutes. I don't have a mind to remember every little statement that has been made. I've made a couple of hundred rulings in this case maybe.

MR. SCHETTINO: I appreciate that. But it seems to me rather coincidental that Mr. Barlow, when we had arguments on other parts of the tape involving whether or not they should have been redacted, Mr. Barlow has had no difficulty whatsoever in furnishing your Honor with minutes and explanations. And it seems to me that it's rather peculiar in this one isolated incident that Mr. Barlow has no recollection. He says that there's been no minutes that have been transcribed. Now, I say that the duty was on the Government when we were finished with your Honor on these transcripts -- it was on -- it was Mr. Barlow's duty if there was a doubt, if there was a question in his mind, he was the one to search the records.

I am sure the Court is aware that these redaction tapes were furnished to myself and Mr. Klein on the day that the jury was to hear these tape-recordings

10 It is not a question that I had them for a week or three weeks in advance. I had the original transcripts many months in advance.

MR. BARLOW: The answer to that, your Honor, is that in addition to having the original transcripts, either the Court or I have had Government Exhibit 3-A on which your Honor made the rulings for the June 14th conversation since some time in late October or early November. If defense counsel had wanted to make sure then, they had a perfect right to either come to the Court, if the Court had it, or come to me, if I had it, and I am sure the Court would have given it over as readily as I. As a matter of fact, I remember the Court saying several times out of the jury's presence that counsel sometime during lunchtime better go over the original transcripts with the redactions to see if they have anything else they want to argue.

MR. SCHETTINO: I agree with that because Mr. Barlow furnished me with the June 14th transcript on that morning. And the only way this was called to my attention when I requested that Mr. Barlow give me an additional copy so Mr. Gentile could follow it -- and that was for the first time as I compared the transcripts with Mr. Gentile and he called it to my attention, that although it didn't appear in the

11 transcript that Mr. Barlow had given to me that morning, suddenly it appears in the transcript that was furnished to Mr. Gentile.

THE COURT: Where is your original transcripts that you were taking notes on the day of the withdrawal? Do you have that?

MR. BARLOW: Yes, your Honor.

THE COURT: Do you have any markings on it?

MR. BARLOW: No, I don't have complete markings on my transcripts, your Honor.

THE COURT: Do you have any markings on yours, the original transcripts?

MR. SCHETTINO: No, I don't.

MR. BARLOW: Yes, your Honor, I do have markings now. As a matter of fact, I think it's imperative in the interest of justice that we mark this as an exhibit. And I think we still have a letter left. So we will mark this as Government Exhibit 3-D as in dog. I will show it to Mr. Schettino, first.

MR. SCHETTINO: Well, I looked at Mr. Barlow's notes and what I garnish from his notes Is that that particular paragraph, that particular [illegible] was in dispute. I gather that from his notes and I have never argued otherwise. In fact, that's been the total thrust of my argument, that that particular

12 sentence was in dispute.

THE CLERK: Document marked for Identification as Government Exhibit 3-D.

MR. BARLOW: Your Honor, the Government's answer is, though, if that sentence is in dispute, then I submit that the Court's copy, Government Exhibit 3-A, shows exactly what happened, and that that sentence was part of the disputed portion. That stayed in and everything that appears beneath that stayed out by agreement.

THE COURT: It doesn't help very much, does it?

MR. BARLOW: It actually does. But I don't want to be put in the position of testifying as to what the different colors of Magic Markers meant because I used different colors for different purposes or different indications at different times. So I can't say positively what it meant.

As I said before, I don't like to testify, but it appears from that, your Honor, that that particular portion, the difference between Defendant Exhibit B and Defendant's Exhibit C, was in dispute at the time that we argued it in the Court's chambers and that it was finally ruled in.

MR. SCHETTINO: What it appears to me, your Honor, just having looked at Mr. Barlow's notes very quickly,

13 the fact that he wrote the word, "environment," in the margin, that exactly is the word that immediately follows the sentence that is in dispute. And I think the fact that he made a notation, "environment," confirms my discussion that we agree that the words, "I have a lot of pinches, all dismissals," are out. And it would then start, "The environment I was in," which I certainly had no objection to. But I certainly and clearly objected to the fact --

THE COURT: Does it show who the stenographer was for this one, 3-D?

MR. BARLOW: Your Honor, we don't know the exact date. That's the problem.

THE COURT: Well, find it. We are not going any further until we find it. 3-A -- 3-A, what date was it logged or marked?

THE CLERK: It's on 12/9.

THE COURT: No. For Identification. When the rulings were made for Identification purposes, 1-D. Then it might have been -- 3-A for Identification was long before that.

You don't have it? You only hav the dates marked in Evidence?

THE CLERK: Only what we took in Court here.

THE COURT: What happened to all the things we

* * *

(The following occurred out of the hearing of the Jury.)

THE COURT: The Government rests.

I will take the motions with reference to the matter which the Court has been reviewing the minutes, the stenographer who took those minutes in chambers is not here today and the Court has made the following ruling: That the transcriptions will not be sent into the Jury Room while they are deliberating and secondly, in the event the Jury desires to hear some of the testimony in regard to the tapes, that the original tapes will be played to the Jury and transcripts will not be given to the.

MR. SCHETTINO: On behalf of the defendant Joseph Gentile, at this time I respectfully move for a directed verdict of acquittal.

I submit that on my cross-examination of Agent Tsotsos, the Government's primary witness, I have elicited certain information from the agent and that there appears certain information on the tapes, so as to have established on behalf of the defendant Gentile an affirmative defense of entrapment.

I submit to your Honor that once I have done

that, the burden is on the Government to prove beyond a reasonable doubt that the defendant was predisposed to have made the bribe.

I respectfully suggest to the Court there is nothing in the case by way of the Government's rebuttal to show the defendant was so predisposed.

True, in the tape recordings that the Jury has listened to after the alleged bribe took place, there is dialogue on behalf of Mr. Gentile that would indicate, or you may infer or the Jury may infer from that dialogue, that Mr. Gentile may have been predisposed to do this.

I submit to your Honor that in the Sherman case and in the Russell case and the Cohen case, all cases dealing in entrapment, although the language of the Court opinion doesn't set it forth in the specific and concise language I now argue, all of those cases do in the recital of the facts indicate that the Government agents had a prior knowledge of the defendant's predisposition or that the Government agent has prior knowledge of an activity that the particular defendant was engaged in and because of that prior knowledge, either of the defendants' reputation or activity, the Government was able to sustain their conduct which led towards the entrapment

3 of the defendant.

I respectfully submit that in this case the Government has offered no proof directly or indirectly that when this investigation started and I respectfully submit as your Honor knows from the testimony that the investigation when it commenced, started with the Government agent having a transmitter on his body.

The evidence shows this particular Government agent would meet with Mr. King, Inspector King, that there was no evidence --

THE COURT: I'd like to hear from you on the prior knowledge on predisposition.

I assume you are talking about the narcotics case where the agent went out and bought all the paraphernalia to make narcotics knowing the person he was going to deal with was a narcotic pusher or manufacturer.

Whether that case actually holds in principle, that's one of the facts in the case --

MR. SCHETTINO: I don't intend to represent to the Court that that is what any of the cases have specifically said but in addition to the Russell case --

THE COURT: I am asking with a viewpoint to reasonable doubt.

MR. SCHETTINO: In addition to the Russell case, there was another case involving a member of the Grand Jury, Second Circuit case. It involved a member of the Grand Jury who had indicated he was willing to sell Grand Jury minutes and based on that knowledge and information that came into the hands of the Government authorities they had an undercover man approach this individual and a transaction took place where he sold this particular agent Grand Jury minutes.

In that case in Sherman and Russell, in every-one of the cases, the factual background is such that the Government knew in advance that they were dealing with a party that was predisposed to bribe, to sell narcotics or predisposed to entering into any nefarious activities.

I say there has been no evidence by the Government that any branch of the Government that Mr. King or Internal Revenue had any previous knowledge or indication that Mr. Gentile was predisposed to have made this bribe.

by introducing by way of tape recording dialogue of Mr. Gentile of what he has done many years in the past doesn't justify and doesn't overcome my affirmative defense of entrapment. That falls far short

of establishing beyond a reasonable doubt that Mr. Gentile was predisposed to commit this act.

MR. BARLOW: The case that Mr. Schettino was talking about I believe was the Rosner case and he wasn't a member of the Grand Jury, but being investigated by a Grand Jury after being indicted --

MR. SCHETTINO: That's not the case. I am familiar with the Rosner case.

MR. BARLOW: There may -- it may be true there was evidence in these cases that the Government knew before and there is no evidence that the Government knew of Mr. Gentile's predisposition before the investigation was started but the Government submits a defendant's admission can show the predisposition, the propensity and in fact when you are talking about a person's state of mind, the one person in the entire world who can talk and tell about his state of mind at a particular point in time or prior point of time is the defendant himself.

The Government submits that the record is abundantly clear, abundantly full of Mr. Gentile's admissions that show that he had a predisposition, prior propensity, so to speak, to bribe, if you want me to catalogue the facts I can go through them.

THE COURT: No. I don't think it was abundantly

clear, I think it was loquaciously abundant.

MR. BARLOW: I referred to him as a walking textbook on bribery and how to do it.

That's what Mr. Gentile's conversation is especially on June 14th showed.

MR. SCHETTINO: That argument reminds me of the fellow who wined and dines the girl and takes her out and spends lots of money on her, takes her to the theater, treats her to the dinner and ultimately gets her in bed and she says, "You know, you didn't have to go through all that. I was going to go to bed with you anyway."

It doesn't justify the fact that this poor fellow expended all his flattery and money.

I submit if the indication is ahead of time that that is the predisposition, I think any form of trickery and chicanery is justified.

In every case that Mr. Barlow has submitted to you, it is unfortunate the language doesn't say that but as lawyers, we look at the case for what it is.

In every one of those cases without an exception, the Government has information that they got from whatever source that this particular defendant was prepared to commit an illegal act.

7 In the Russell case, they knew the defendant was engaged in selling narcotics illegally. I don't quarrel with that.

Since they possess that knowledge, I say the law permitted them to use any form of chicanery or tricks to trap this defendant into the commission of a crime.

I submit in the totality of the People's case, there is nothing here to show they had the slightest indication that Mr. Gentile was prepared to give this fellow a bribe.

I submit the evidence is to the contrary that in the phone call of 11/30, that Mr. Gentile said to this agent that "If you feel that I have violated the law, subpoena me and take me to the Grand Jury."

The only time there is any indication that Mr. Gentile had been predisposed to do this is when the bribe is passed and now he has adopted the agent as his long lost son and he makes many confessions to the agent.

I say that is not what the law says the Government must prove to overcome, if your Honor feels I have established a defense of entrapment, and I submit in that connection the law says my defense can

be any evidence no matter how slight to indicate there was some form of engrapment.

I think the law goes further and says if I have done that then the Government has an overwhelming burden. I can do the same thing and pick up the tape of June 14th after the bribe was made and we can read dialogue about Mr. Gentile's statement about policemen.

I submit that it is not an answer to what the Government's burden was in this case.

THE COURT: I think there is enough to go to a Jury on this. It is a question of fact and question of reasonable doubt itself.

I will deny the motion at this time.

MR. SCHETTINO: I respectfully object to your Honor's ruling. Additionally --

THE COURT: There is no issue of contest at this time that the money was paid to the agent as I understand.

MR. SCHETTINO: No, there is no contest whatsoever.

THE COURT: That's not an issue presented to the Jury.

MR. SCHETTINO: No, it won't.

THE COURT: Whether or not he was predisposed

and whether or not he was entrapped to do so.

MR. SCHETTINO: That's correct.

THE COURT: Well, that is succinctly put.

MR. SCHETTINO: I further move for a dismissal in the case's entirety on the grounds that the introduction of the tape recordings on behalf of the defendant Gentile were highly prejudicial, that there is matters contained in the tape recordings that refer to the possibility of the commission of other crimes, that the tape recordings in their totality ere so redacted that the secrets of conversations had not been fairly presented to the Jury on behalf of the defendant and on every ground and motion I have heretofore made to your Honor regarding the tapes I move for dismissal of the indictment.

THE COURT: That's a question of fact for the Jury, whether or not the tape recordings reflect the full import or whether or not it limited the issues by reason of it.

MR. KLEIN: At this time in behalf of the defendant Ernest La Ponzina, I move for dismissal of the indictment and directed verdict of acquittal upon the following grounds:

Number one, there is no bribery in this case and can't be in this case because of lack of an

essential element.

There couldn't be a corrupt influence. Mr. Solar testified that this unit Tsotsos was a member, had no tax audit function.

Secondly, Tsotsos himself said he had nothing on Ernie.

It further appears that both of these defendants were targeted by Mr. Mitchell's tape order and that Tsotsos came in not for a tax case, obviously came in equipped, the first time he met either defendant, he was searched by fellow agents, he had four to six backup people and never did that before.

I say the whole thing was not a tax investigation and therefore if he had no tax audit authority then how could you have a corrupt intent to influence and official agent when he had no authority to perform that act.

He was there solely to get an offer of money. We are not charged with a gratuity.

THE COURT: I would answer you by saying, as far as your motions is concerned, it is true your case is a much more narrower case than Mr. Gentile's case insofar as the bribery but it is a question of fact for the Jury and it is not the Court's province to take the case away from the Jury.

11 MR. KLEIN: Secondly, there is no proof of knowledge that Mr. LaPonzina has any knowledge whatsoever that a bribe, if there was one, had in fact been offered by Mr. Gentile.

The question is asked on August 8th of Mr. LaPonzina with some ambiguous in nature, they didn't provoke a responsive answer, didn't provoke any answer to a responsive question which would indicate knowledge on the part of Mr. LaPonzina.

Not only do we get that from the tape, the Government itself concedes when they throw in this thing about golf. They claim the free golf lessons were part of the bribe.

If Mr. LaPonzina had actual knowledge that $1,000 had been offered by Mr. Gentile on his own behalf what need would there be for another bribe?

We also have further admissions on the part of the Government. We come in with this ad libbing of a gesture and a whisper. Neither one are on the tapes, neither one are in the memorandum of August 8th and any memorandum dealing with Mr. LaPonzina is missing, whether it was never made or favorable to him, it should be construed against the Government.

For the first time we hear them come up with ad libbing of gesture and whisper and we heard the

12 leading question --

THE COURT: I won't say the first time in my Court.

MR. KLEIN: I'd say it's a recent fabrication belied by the evidence.

My third point, is there was no act than assuming Mr. LaPonzina had knowledge of Mr. Gentile's offer in his behalf, there was no act in furtherance, there is insufficient evidence of participation, it is too slight to submit to the Jury.

I cite U. S. against Stromberg, 268 Fed 2d, 256, in connection with two of the defendants therein, one of whom I represented, where the Court stated, the independent evidence was too slight to warrant the admission of hearsay declaration and too slight to submit to the Jury.

That case was much stronger than this. Here all the conspirators in this narcotics conspiracy are discussing how to bring in narcotics with the new money man, how do we know you can bring it in in quantity and the customs man said: Sure you can drive a truck across; and the Court held it was too slight to submit to the Jury and the Second Circuit reversed.

The last thing is on page 562 of the minutes. Mr. Tsotsos admitted that there was no $1,000 bribe

offer, never happened.

Here's the conversation, your Honor:

"Question: Did anybody tell you to go back and get him to repeat it, telling him to say that's a gesture, say it out loud about money?

"Did you go back? You didn't have any evidence on tape of money passing or any conversation or whisper or gesture of Mr. LaPonzina.

Did you ever think of going back to him again arranging another meeting and this type perpetuating it?

"Answer: No.

"Question: You could have struck up another conversation and said 'Ernie, you know that $1,000 that Joe gave me' you could have started with that preamble.

"Answer I didn't do it.

"Question: But you could have done it if it happened?

"Answer: It didn't happen.

"Question: That is right."

In view of all of that, I respectfully move for directed verdict of acquittal.

MR. BARLOW: I believe the second point was that AGent Tsotsos' questions were very ambiguous

* * *

16 back another time and try to get him to say louder: Joe will give you the money.

MR. KLEIN: If we believe the government's testimony then this bribe in behalf of Mr. LaPonzina was complete without meeting with Mr. LaPonzina. In other words, if it was offered on August 3rd by Mr. Gentile and paid on August 9th by Mr. Gentile, Mr. LaPonzia nad nothing to do with it whatsoever.

He didn't participate at all in the bribe.

THE COURT: I think with all the points you have raised, it is narrow but it is still a question of fact for the Jury.

MR. KLEIN: I renew my double jeopardy motion.

THE COURT: Denied.

MR. KLEIN: I respectfully move to direct the Government to elect which count, three or four, they intend to go to the Jury on the grounds of collateral estoppel and duplicity and same evidence rule.

In Count 3 we have a joint venture aiding and abetting and Count 4 we have a conspiracy which is supposed to be a joint partnership in crime both to commit the same thing.

On the bill of particulars I asked the Government whether they contend there was a joint venture to aid and abet each other acting in concert and they

17 said: Yes. And I say it is the same evidence rule, and we are being hit with two separate crimes.

I am aware of the rule which says if you have a conspiracy crime you can be charged with a substantive crime.

I am not arguing that. My point is when you charge him as a principal under 18 USC, sub-division 2 --

THE COURT: That's a special section. That is the catch-all section so every agent acts as a principal without having to spell out his agency during the trial.

MR. KLEIN: It is aiding and abetting --

THE COURT: Aider and abettor as a principal without worrying whether he was an agent. It makes no difference under Section 2 of USC 18.

MR. BARLOW: Your Honor has denied his motion for the election?

THE COURT: Yes.

We will take a five-minute recess.

MR. KLEIN: I wanted to offer one piece of evidence.

MR. BARLOW: I'd like to at least tell the Jury the Government has rested their case. That will take five seconds.

(Jury present.)

* * *

20 custody meetings. I'd like to introduce into evidence as the regulation, and read that to the Jury.

You recall the agent testified as far as Mr. LaPonzina was concerned he flouted the regulations where he didn't advise Mr. LaPonzina his rights.

THE COURT: Those regulations are reglatory as far as the agents are concerned and not considered Miranda statements.

MR. KLEIN: This is U.S.A. v. Cardi, 354 U. S. which held when an agency didn't uphold the rules and regulations that consitutes a violation of the Fifth Amendment.

I request that if the Jury finds that, as a matter of fact, I ask you to find it and suppress all evidence.

MR. DARLOW: If I can respond, the correct citation is Arcadia vs. Chaughnessy. That was a suit involving Immigration Naturalization Service where the Supreme Court found the procedures by which a certain penalty accrued to an alien were so deficient under both the law and the regulations, that with a part of the Immigration Naturalization law that it deprived aliens of due process.

The Government submits it is completely in opposite in this situation.

21 MR. KLEIN: I offer in evidence --

THE COURT: I will take judicial notice of the fact that there is such a regulation in the Internal Revenue Service and you may make comment on it as part of the evidence.

The Court will not charge it.

MR. KLEIN: Shall I have it marked for identification?

THE COURT: Yes.

MR. KLEIN: Could I read portions of it to the Jury?

MR. BARLOW: I object to that.

THE COURT: It has been testified to on the trial as to regulations. I will not charge it as a regulation to be charged as law because it is not law. If he wishes to charge that it is an entrapment situation, he may do so.

MR. KLEIN: That's all I have, your Honor.

THE CLERK: Document marked for identification as Defendants' Exhibit L.

(So marked.)

(Continued on next page.)

* * *

T3R2
DDS:MM

(Continued summation by Mr. Klein.)

Was he a square shooter when he exhibited that hostile attitude to me on cross-examination? Was he a square shooter when he lied about the gesture and the whisper, and not inthe reports. You know we all remember the story of the little boy who ate the jam. His mother wanted to know what happened to the jam. He said, "I didn't see it."

But in the meantime he had jam on his face and jam onhis fingers. Isn't there jam on Mr. Barlow's face when Mr. Barlow asked Mr. Tsotsos in an attempt to rehabilitate him to show that it was not a recent fabrication, about this whisper, and Mr. Barlow said to him, "Didn't you tell theGrand Jury that Mr. LaPonzina whispered to you that Mr. Gentile would pay the bribe?"

Now this is Mr.Barlow's case. He sent it to the Grand Jury. They prepared this case. He knows every word that is in the Grand Jury testimony.

Mr. Barlow suggested a lie to that witness twice. And the witness on cue, because whatever Freddy wants Nicky gave him, and Nicky gave him the answer twice.

He even gave me the answer. And if I had been

asleep and I had not done my homework and I had not read the Grand Jury minutes I wouldn't have known it either.

Don't you think it was Mr. Barlow's duty as an officer of this Court to tell you that that is a lie, that his own witness lied. He sat here and let it go through. Let me tell you about trial counsel.

If I put my witness on the stand I know in advance every answer he is going to give when I ask him questions. I'm not going to ask him a question and get a bad answer. He knew the answer in advance. He sat here, and sat here, and sat here.

Only because Ernie LaPonzina has a vigourous defense counsel, which I am sure each one of you would want if you were in his chair, that it came to light that itwas a lie, that he never mentioned the word "Whisper" to the Grand Jury.

There is jam on your face, Mr. Barlow.

How about the other question when Mr.Barlow asked this witness on August 3, didn't Mr. Gentile tell you that he had discussed the bribe with Mr. LaPonzina.

And the robot answers, "Yes sir."

Do you remember when I finally got up and I

read to him in the transcript where Mr. Gentile says, "No, we never discussed it." It is right in there. You can read it. I have it here but I think you recall it.

He said, "We never discussed it." Mr. Barlow knew what was in the transcript. He didn't correct it. He led his witness. The end justifies the means. Jam.

Now we talk about credibility. I say this person who is on the stand has a complete lack of credibility. First in determining how much or all of his testimony he wants to believe, his Honor will instruct you that if you find that he has deliberately lied in a material portion of his testimony you have the right, you may if you so desire, throw out his entire testimony and disbelieve him. Now, one of the ways to test credibility is was his testimony recollection -- an independent recollection or was it memorized? Was he programmed? What was his attitude toward the prosecutor on direct examination?

And what was his attitude towards me on cross-examination? Is he an interested witness or did he show his bias, which side he was on? Is he interested in getting a conviction here? Did he try to help the

myself, and defense counsel.

Now, defense counsel has made several references about the integrity of those in the United States Government concerned with the prosecution of this case.

You heard Mr. Klein say "The jam is on your face, Mr. Barlow."

You heard him say agent Tsotsos was a liar.

You heard Mr. Schettino say that my conscience might be bothering me, and I can assure you it is not. But, let's take those comments and see what they really mean, for if there is jam on my face and there is jam on Agent Tsotsos' face -- as he sat there for five days and testified and you had a chance to observe his demeanour, listen to his testimony and compare it with the tapes and the transcripts of those conversations -- doesn't the jam also have to be spread upon Mr. King, upon the four to six agents out there in the surveillance cars, who listened to the recordings, took the tapes back to Mr. King, where he locked them in the box?

Doesn't the jam have to be spread on Mr. Shanley?

Remember, on cross examination, Mr. Tsotsos said he had the case before me and he discussed the

* * *

conversations, the tapes and the transcripts with them, and finally, doesn't the jam have to be spread on Mr. Dillon's face, since he was the person who presented Agent Tsotsos to the Grand Jury, September 27, 1972?

I submit to you that the jam has to be spread too far. But I don't want to belittle that point. I want you to hold myself, Agent Tsotsos, Inspector King, Inspector Kennedy, and everybody else who participate in this prosecution to the high, honorable, honest standard you have a right to expect, officers and attorneys and agents of the United States Government to adhere to.

MR. KLEIN: I object to the prosecutor putting his credibility on the stand with the witnesses.

THE COURT: Yes.

MR. KLEIN: Would your Honor ask the jury to disregard that statement, please?

THE COURT: The jury will disregard the statement.

MR. BARLOW: (Continuing) You heard in my opening statement, what I thought the Government evidence would be and I told it to you in a chronological manner.

* * *

in connection with Mr. La Ponzina's taxcase, and finally, did they confer together, agree together to bribe Mr. Tsotsos concerning Mr. La Ponzina's tax case?

Now, you remember I read to you the counts of the indictment and I told you at that time, there were certain factors that would remain constant throughout -- some of the counts, with respect to both counts one and two and you will hear Judge Costantino charge that one of the elements that must be proven is that Agent Tsotsos was an employee of the Internal Revenue Service, and that he had before him a matter in his official capacity, and put in plain words, what we are talking about is a tax case against Mr. Gentile.

Now, let's go into the facts of what the tax case concerned in the context of a brierycase because that is what we are here for.

You remember that Agent Tsotsos said after the case was routinely assigned to him, June 15, 1971, he met sometime that summer with Inspector King and consented to wearing the body transmitter, and having the conversations recorded, with Mr. Gentile and later consented with respect to Mr. La Ponzina.

Let me go back for a second. You remember on cross examination, Mr. Schettino asked him at one point, "Well, could you have refused?", and he said, "Well, it was one of my duties as a special agent."

But then, on redirect examination, didn't he clear that up? He said, "I could have refused," and the question, "What would have happened then?" and the answer, "Nothing."

Hewouldn't have been wired. The conversations wouldn't have been recorded, and we would have never known about this case.

After Agent Tsotsos consented, you remember, Inspector King said that he had to submit written justification in order that Agent Tsotsos legally could be fitted with the body transmitter and have these conversations recorded and he said there was a process of review; that his written justification had to go the original inspector of the Inspection Service of the Internal Revenue Service in New York, and after that review, it had to go to the Director of the Inspection Services and then after that, it went to the Attorney General, and sometime later on, Inspector King and Agent Tsotsos received authorization to have these conversations recorded.

Now, did you hear Mr. Klein and Mr. Schettino ask what that justification was?

MR. KLEIN: That is unfair comment. That is within the province of the prosecution. We have no access to that.

THE COURT: I didn't hear the statement.

MR. KLEIN: May we have a sidebar?

It is prejudicial to make a remark like that.

MR. SCHETTINO: I would have been up, but I couldn't hear the statement.

MR. BARLOW: The question was "Did you hear either Mr. Klein or Mr. Schettino ask what that justification was?

THE COURT: It is not fair comment.

The jury will disregard it.

MR. BARLOW: I am sorry, your Honor.

MR. SCHETTINO: Now that I heard what he said, I voice my objection, too.

THE COURT: All right.

MR. BARLOW: Now, after the authorization was received, you heard Agent Tsotsos say that he went with Agent Farrell, and met with Mr. Gentile on September 8, 1971, and you heard Agent Farrell say that the one missing right, the right to have an attorney and have him present, he gave to Mr. Gentile.

Did Mr. Tsotsos hedge about that? Did he say, "Oh, I might have given him that right. I might have said that. I'm not clear. Show me a transcript, play the tapes."

No. He said, "No, I didn't give it to him". And wasn't that because the other agent had?

Remember Agent Farrell's testimony? He said while they were questioning Mr. Gentile, he kept breaking in and saying, "I know that. Ask me your questions."

Then Agent Tsotsos, met on September 23, 1971, with Mr. Gentile and telephoned him on November 30, 1971, and it's true, at that time, that he told Mr. Gentile over the phone that he did have evidence.

You remember Mr. Schettino at one point in cross examination, saying,"Does it matter if a person is a one dollar criminal or ten thousand dollar criminal?"

I submit there is a big difference.

(Continued on next page.)

In response to Mr. Schettino's comment about stopping at September 8, 1971; stopping at September 23, 1971, let's go back to what the charge is.

Mr. Gentile is not being charged with bribing anyone in his prior criminal tax case. He is not being charged with bribing anyone in any civil audit. He is being charged in his tax case or after his tax case for two things: offering a bribe on June 14, 1972, some months later and giving the bribe the next day.

MR. SCHETTINO: If your Honor please, I want to object.

Mr. Barlow has confused me and I hope he has not confused the jury.

He made the statement that Mr. Gentile has not been charged with offering a bribe on his first tax audit and he relates that to September 8. I will concede that Mr. Gentile was audited in 1961 and never offered a bribe but September 8 started this particular investigation.

THE COURT: Yes. They are two completely separate transactions.

MR. BARLOW: I am sorry if I confused you. You know the crimes with which we are concerned and they occurred between June 14 and August 9, 1972.

* * *

Now, Mr. Schettino made a lot of hay about the gold Cadillac and it's true that Agent Tsotsos talked about the gold Cadillac initially that day, June 14, didn't he, but how much more conversation did you hear about the checks?

MR. SCHETTINO: I submit, your Honor, that is unfair comment in view of the redaction we have done on these tapes which Mr. Barlow is aware of, and the jury is aware they have not heard everything on these tapes.

THE COURT: I know and the jury knows that.

MR. BARLOW: Now, the second element of the crime of bribery the Government has to prove with respect to Mr. Gentile is whether or not he corruptly offered on June 14 and corruptly gave on June 15, $3,000 to Agent Tsotsos in order to stop, to fix, to discontinue his tax case and you will hear Judge Costantino charge you as to what "corruptly" means in the federal law.

Now, Mr. Schettino has already said there is no dispute that this $3,000 was handed to -- not handed -- but Agent Tsotsos got that $3,000 on June 15. But don't we have to look into the intent of Mr. Gentile to find out how the money was given and

* * *

1972 -- remember, they went to ram records and then they went to the luncheonette -- "Never, never incriminate yourself even if your back is against the wall," and then he said something else interesting. "You know, I could have done it differently. It didn't cost more money. There are people who make you --" talking about Agent Tsotsos -- "who make you look like a puppet. Your superiors and bosses." And he said "I had a prior tax case. It was out. The agent, I couldn't do anything with him." And again, he said or instructed Agent Tsotsos that "No one knows your business. Don't tell your wife, don't tell your brother, don't tell your sister, don't tell anyone."

He said, "No one knows my business. It has taken me a lot of years and I have gotten hurt several times but no one knows my business because I don't tell them."

Ladies and gentlemen, I submit that what Mr. Gentile said amounts to a walking textbook on how to bribe people, on how to conduct yourself when you bribe someone and how to keep that bribe secret. And I submit to you that the evidence shows circumstantially that Mr. Gentile did learn this over a number of years and it was his experience that taught him this.

* * *

THE COURT: First, as to your request to charge, it's easier to say what I am going to charge rather than what I am not going to.

I will charge on Page 7, Paragraph A. Request number seven, Paragraph A. That will be included in my credibility charge. That will be added to my credibility charge.

Then Paragraph -- request eleven, page 15 only.

MR. KLEIN: What number?

MR. SCHETTINO: Page 15.

THE COURT: 11. Request eleven. And request number twelve.

Pages 18, 19, 20 and 21, except for the first paragraph on Page 18. Those will be included in my charge.

Then as to your supplemental charge, as to your -- A-2, the Court will not charge in the substance that you have given it. I have my own charge in reference to that. The balance will not be charged. That's as to La Ponzina.

Now, as to Gentile. Well, I am charging entrapment, but the language that the Court adopts is, the Second Circuit case.

MR. SCHETTINO: Is that the language that I have seen, Judge? Mr. Gould showed me --

THE COURT: Yes.

MR. SCHETTINO: May I respectfully then on the record --

THE COURT: Yes.

MR. SCHETTINO: -- make an objection that if that is going to be the sum total of your Honor's charge on entrapment, I feel I have exhausted myself here for seven weeks on this question of entrapment, and I respectfully submit -- and I don't mean this critically --

THE COURT: No, go ahead.

MR. SCHETTINO: That after having done, I hope, my homework with some amount of efficiency, the charge that your Honor intends to give to this jury is casual at best. And in view of Mr. Barlow's remarks in summation, that Mr. Gentile wrote a book on bribery, et cetera, your charge as emphasized on entrapment applies only to the innocent person.

THE COURT: All right.

MR. SCHETTINO: I object to that. We are all presumed to be innocent. But that's what that charge conveys.

THE COURT: I will add on --

I think your objection is well taken. In looking at my charge, I will start -- I think the first three paragraphs are rather about the same in essence of what I have had already. I will start with your -- in Paragraph 4. I will read Paragraph 4 from your request, and Paragraph 5.

MR. BARLOW: Your Honor, at this point, I am gdng to have to object to that, too.

THE COURT: Yes.

MR. BARLOW: Because Paragraph 5 talks about overreaching participation. And that was the precise point that the Supreme Court had in front of them in Russell.

THE COURT: Wait, now. Overreaching is a problem.

MR. KLEIN: That's the Candom 26 case. It is not the Russell case.

MR. BARLOW: Your Honor, the law in this circuit after Russell is that the agent has to have committed some crime. You will remember there was a Southern District case about the interstate bribery where the government provided the interstate element by making a phone call from New Jersey. And the Second Circuit said -- I remember they came back

with a supplemental opinion to clarify that by saying, you know, we realize this in view of Russell, but all we are saying is that the government can't gain federal jurisdiction by supplying it themselves.

I submit that Russell has excluded forever now hte --

THE COURT: All right, I will not charge --

I will charge 4, and I will not charge 5. But I will charge --

I am looking at 6.

MR. SCHETTINO: That, by the way, to please the Court, that is a -- that was taken on a verbatim basis from Am Jur. It is their definition.

THE COURT: Yes. On 6.

What's that? 6.

MR. SCHETTINO: Yes, on 6. That's a definition that I extracted from Am Jur, Section 143.

MR. BARLOW: Your Honor, I would agree with that up until the point that that paragraph 6 starts marshalling the evidence.

THE COURT: Yes. That's the point. I don't marshal the evidence.

MR. SCHETTINO: You don't, Judge?

THE COURT: No.

MR. SCHETTINO: Well, I unfortunately suspected that your Honor did not, because I think you indicated that to me in the --

THE COURT: That's what I am looking at right now.

MR. SCHETTINO: All I am trying to find out, Judge, is just a fair shake for the defendant.

THE COURT: That's what you are going to get.

MR. SCHETTINO: And that the jury has a comprehensive understanding of what entrapment is. And I say the overuse of the word, you don't trap innocent people. You don't trap --

And as I say, I assume Mr. Gould is an innocent person, and I assure you that I can entrap him if you give me enough time. And this is my quarrel with the emphasis on that.

MR. KLEIN: Your Honor, on behalf of Mr. LaPonzina, I respectfully except to all those requests that I work so laboriously on and submitted to your Honor.

THE COURT: All right. Most of those in my charge you may not agree with my bringing them down so the jury understands them without putting the

evidence in there. Those --

MR. BARLOW: Your Honor, just to set the record straight, I think Mr. Klein is objecting to the denial of all those -- not the --

THE COURT: Yes, they are all in them.

MR. KLEIN: Not only the denials. And I hereby offer my request to charge and my supplemental request as an exhibit in this case.

THE COURT: Yes, I will mark them.

MR. BARLOW: They are part of the record.

THE COURT: Sure. I have my markings on them.

MR. KLEIN: My only comment is I have not -- I am intending to presume -- this may sound impertinent, but it seems like a boiler plate. It just drops in like a cap that will fit any head.

THE COURT: That's all they need. Because they know the facts in the case.

MR. SCHETTINO: Judge --

THE COURT: There's no need for summation if the Court is going to start marshaling the evidence and give them some kind of impression which I will not do. I don't care how careful the Court is when the Court starts marshaling evidence.

Now then, you find -- to me, that is

practically telling the jury what the facts are. Because the Court always leaves out some facts unless you run through all of the testimony. That's the only way you can do it is by reading it. And I will not do that.

MR. BARLOW: It's like a hypothetical question to an expert.

THE COURT: That's the reason I do it my way.

MR. SCHETTINO: Would your Honor consider -- on the charge of entrapment, would your Honor consider instructing the jury that they can -- in considering the defense, that they can in analyzing the evidence, that they can make their own determination as to whether Mr. Gentile showed a predisposition regarding the question of bribery.

I am merely trying to --

Because I feel very, very strongly on the point that I made to the Court this morning.

THE COURT: I personally think that the Second Circuit has pretty well clearly identified what entrapment is. And I simply placed it in the record so that the minds of ordinary people would understand it.

For instance, in such circumstances, you may find that the government agent has not seduced innocent

people, but only provided the means. Now, that is very simply language. That is not difficult language. And they talk about beyond a reasonable doubt. And that's all the jury is supposed to know. There is no requirement in marshaling the evidence. And I don't think I will marshal the evidence. I think they know now at this time after you have gone through the summations about the reporter being placed on him, the tapes being taken down and the statements being made.

There isn't much more the Court can say.

Thatis not a boiler plate charge. That is a charge I developed myself, except I placed the law in between.

All right, Mr. Schettino.

MR. SCHETTINO: Yes, Judge.

THE COURT: Mr. Barlow.

MR. BARLOW: Yes, sir.

THE COURT: First paragraph of that charge, if you will follow yours, you will see it covers number one, which you used different words. It's practically the same thing.

Paragraph two, I will charge paragraph two.

MR. SCHETTINO: At my request.

THE COURT: At your request.

MR. SCHETTINO: May I see it?

MR. BARLOW: Talking about previous intent or purpose.

MR. SCHETTINO: Fine, all right.

THE COURT: I don't know where you get the authority for paragraph three. There is no sentence -- no such authority that I know of. I will not charge that. I see no authority for that.

I will give you the benefit of charging paragraph four or place that in my own charge.

MR. SCHETTINO: All right.

THE COURT: And I will charge in conjunction with my own --

Is this the first paragraph of --

This is paragraph six. And I will -- instead of charging the body of the next paragraph, I will charge the last paragraph which was -- which says you may consider all of the above; I will say, you may consider all of the evidence taken together.

MR. SCHETTINO: All right, Judge. Fine.

THE COURT: In reaching the determination.

So they know now they must consider all the evidence.

MR. SCHETTINO: All right. Thank you, Judge.

THE COURT: All right, you can bring the jury in now.

(Whereupon, the jury entered the courtroom.)

THE COURT: All right, Ladies and Gentlemen, we are now going to go into the Court's charge. And I wish you would listen very attentively.

Mr. Foreman, Ladies and Gentlemen of the Jury:

We now come to the final stage of the proceedings. The Court will now charge you on the law to be applied to the facts in the case.

As you may recall, I initially gave you a precharge as to the manner in which the case would be presented to you. I told you that most of the evidence in the case would come in the form of the testimony of witnesses,and that you were to pay special attention to the manner in which the witnesses testified.

I believe I also instructed you that you would be the judges of the facts in the case, that being your sole province; and that your recollection of the facts after having heard all of the evidence in the case -- the testimony of witnesses and the documentary proof -- was to control the determination of the

issues.

Likewise, at that time, I told you that I would be the judge of the law. This has not changed at this stage of the proceedings. I will not review the facts in this case for you because I am certain that with the summations by the attorneys there is no need for the Court to review the facts.

In any event, if you find that there is some fact in the case that you may have forgotten or don't recollect, or you can't agree with each other in your deliberations, you can have it read back from the record and that will, I am sure, refresh your memory.

In any event, I am the judge of the law. You must accept what I say to be the law in this case.

Now, the attorneys have been permitted by the Court and by the rules to make opening statements and summations to you. Under no circumstances are the statements they have made by way of opening or by way of summation to be taken as evidence.

However, the Court and the law does permit you to take the arguments that they have proffered before you and weigh those arguments.

And if you agree with that which they have said on eitehr side of the case, you may use those

arguments in your deliberations and in discussing the case with each other, and try to convince one another as to what the final determination will be with reference to the deliberations at hand.

If you feel that the arguments are not commensurate with the testimony and the proof in the case, you may disregard them. The arguments are not evidence. You need not weigh them. However, there are times when the arguments of the attorneys will give you an insight as to something you may have missed, and you might discuss that portion of it if you so desire.

Now, of course, I also said to you that during the trial, the Court will be the judge of the law. Likewise, as to motions which at times we had at a side bar, as you may recall. That was not for the purpose of keeping any of the proof from you, but were matters of law that were discussed between the attorneys and the Court itself and should not have come before you.

In any event, if you feel that you have discovered by some stretch of your imagination what this Court thinks as to either some of the testimony or the case itself, you should remove that from your

mind because I tell you here and now I have come to no conclusion in this case, nor have I indicated to you in any way whatsoever what my feeling is with reference to the facts in the case or with reference to the guilt or innocence of the defendants. That is your province and your job. You should not try to weigh what you believe the Court's impression may be.

You must understand that the lawyers who appear before you are advocates. They are advocating the best case they can for the parties they represent and they have a right to exercise as much forcefulness as they desire in their questioning or otherwise and presenting their case.

I say this because this is within the framework of the ordinary trial.

Of course you know by this time that this case has come before you by way of an indictment presented by a Grand Jury sitting in this Eastern District. Thatindictment charges the defendants with the counts I shall now read to you. Remember, the indictment is merely an accusation, merely a piece of paper. It is not evidence and it is not proof of anything.

Count one:

On or about the 14th day of June, 1972, within

the Eastern District of the City of New York, the defendant Joseph Gentile corruptly did, directly and indirectly, offer a thing of value, that is three thousand dollars, to Nicholas Tsotsos, an employee of the United States, acting for and on behalf thereof, in an official function, under and by authority of the Internal Revenue Service, United States Treasury Department, with intent to influence the said Nicholas Tsotsos' decision and action on a question and matter then pending before him in his official capacity, and to influence the said Nicholas Tsotsos to collude in, allow and make opportunity for the commission of a fraud on the United States, and to induce the said Nicholas Tsotsos to do an act in violation of his lawful duty, all with respect to the outstanding tax liability of the defendant Joseph Gentile.

This is under Title 18, United States Code, Section 201(b)(1)(2) and (3).

Count Two:

On or about the 15th day of June, 1972, within the Eastern District of New York, the defendant Joseph Gentile corruptly did, indirectly and directly, give a thing of value, that is three thousand dollars, to Nicholas Tsotsos, an employee of the United States,

acting for and on behalf thereof, in an official function, under and by authority of the Internal Revenue Service, United States Treasury Department, with intent to influence the said Nicholas Tsotsos' decision and action on a question and matter then pending before him in his official capacity, and to influence the said Nicholas Tsotsos to collude in, allow to make opportunity for the commission of a fraud on the United States, and to induce the said Nicholas Tsotsos to do an act in violation of his lawful duty, all with respect to the outstanding tax liability of the defendant Joseph Gentile.

Again, under Title 18, United States Code, Section 201(b) (1) (2) and (3).

Count Three:

On or about and between the 14th day of June, 1972, and the 9th day of August, 1972, both dates being approximate and inclusive, within the Eastern District of New York, the defendant Ernest LaPonzina and the defendant Joseph Gentile corruptly did, directy and indirectly, offer and give things of value, that is free golf lessons and one thousand dollars, to Nicholas Tsotsos, an employee of the United States, acting for and on behalf thereof, in an official

capacity, under and by authority of the Internal Revenue Service, United States Treasury Department, with intent to influence the said Nicholas Tsotsos' decision and action on a question and matter then pending before him in his official capacity, and to influence the said Nicholas Tsotsos to collude in, allow and make opportunity then for the commission of a fraud on the United States, and to induce the said Nicholas Tsotsos to do an act in violation of his lawful duty, all with respect to the outstanding tax liability of the defendant Ernest LaPonzina.

Title 18, United States Code, Section 201 (b) (1) (2) and (3); Title 18, United States Code, Section 2.

And Count Four. This is known as the conspiracy count.

On or about and between the 14th day of June, 1972, and the 9th day of August, 1972, both dates being approximate and inclusive, within the Eastern District of New York, the defendant Ernest LaPonzina and the defendant Joseph Gentile, willfully and knowingly did combine, conspire, confederate and agree together with each other, and with diverse other persons to the Grand Jury unknown to commit the

following offenses against the United States:

One. To corruptly, directly and indirectly give things of value to an employee of the United States, acting for and on behalf thereof, in an official function, under and by authority of the Internal Revenue Service, United States Treasury Department, with intent to influence the said employee of the United States as to his decisions and actions on questions and matters then pending before him in his official capacity, and to influence the said employee of the United States to collude in, allow and make opportunity for the commission of a fraud on the United States and to induce the said employee ofthe United States to do acts in violation of his lawful duty, all with respect to the outstanding tax liability of the defendant Ernest LaPonzina, in violation of Title 18, United States Code, Section 201 (b) (1) (2) and (3).

In furtherance of the conspiracy and to effect the objects thereof, the defendant performed the following overt acts:

One. On the 29th day of June, 1972, within the Eastern District of New York, the defendant Ernest LaPonzina and the defendant Joseph Gentile met

Nicholas Tsotsos.

Two. On the 3rd day of August, 1972, within the Eastern District of New York, the defendant Joseph Gentile met with Nicholas Tsotsos.

Three. On the 8th day of August, 1972, within the Eastern District of New York, the defendant Ernest LaPonzina, met with Nicholas Tsotsos.

Four. On the 9th day of August, 1972, within the Eastern District of New York, the defendant Joseph Gentile met with Nicholas Tsotsos.

This is under Title 18, United States Code, Section 371.

Counts one, two and three charge violation of Title 18, Section 201 (b) (1), (2) and (3). Count three also charges violation of Title 18, Section 2. I shall now read the statutes to you.

(Continued on next page.)

R3PM
B:MM

Section 201 of Title 18 of the United States Code provides in relevant parts that:

Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official, with intent to influence any official act; or to influence such public official to commit or aid in committing or allow any fraud on the United States, shall be guilty of an offense against the laws of the United States.

Section 2 of Title 18 of the United States Code reads as follows:

A. Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

B. Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Count 4 charges the defendants with conspiracy in violation of Title 18, United States Code, Section 371.

I will now read this statute to you.

Section 371 of Title 18 of the United States Code

provides in part that:

If two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, each is guilty of an offense against the United States.

Three essential elements are required to be proved in order to establish the offense of bribery charged in Counts 1, 2 and 3 of the indictment.

First: The act or acts of directly or indirectly offering or promising to a public official a sum of money or thing of value, as charged in the indictment:

Second: Doing such act or acts willfully and corruptly; and

Third: Doing such act or acts with the intent to influence some official act of said public official, as charged.

It is not necessary that any particular words or language or signs or symbols be used, in order to offer or promise a public official a sum of money or thing of value with the intent to influence some official act of that public official.

Neither is it necessary that the proof established an actual presentation or tender, or even a

show or display of the money or thing of value offered or promised. Nor is it necessary that the thing of value offered or promised have any definite or ascertained value, or even be in existence at the time of the offer or promise.

What is necessary, in order to establish proof of an offer or promise such as is alleged in the indictment, is that the evidence in the case established that the accused, directly or indirectly, in some way or manner, or through some contrivance, communicated to the public official designated in the indictment certain words or language, or signs or symbols, or some one or more or a combination of such, which, when viewed in the light of all surrounding facts and circumstances shown by the evidence in the case, amounted beyond a reasonable doubt to either an offer or a promise, or both an offer and a promise, to the official of some money or thing of value, made with intent to influence some official act of the public official.

Now, Counts 1, 2 and 3 are the ones that charge the corrupting of a public official by the offer, number one, of a bribe, number two, of the tendering of the bribe, and Count 3 as to Mr. LaPonzina and Mr. Gentile as the tendering of a bribe. These essentials

are required by the Government to be proved beyond a reasonable doubt. And it goes without saying that the Government fails to prove any one of these three essentials that I have read to you in an offer of a bribe, then, of course, the defendant must be acquitted.

Now, Section 201 of Title 18 of the United States Code defines the term "Official Act" to mean "any decision or action on any question, matter, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity."

Section 201 of Title 18 of the United States Code defines the term, "public official" to include "an officer or employee or person acting for or on behalf of the United States, in any official function, under or by authority of any department, agency, or branch of Government."

An act is corruptly done, if done voluntarily and intentionally, and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means

So, a person acts corruptly whenever he makes a willful attempt to persuade or influence the official action of a public official, by an offer of money or

anything of value

The motive to act corruptly is ordinarily a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit or benefit to another.

Count 3 of theindictment also charges the defendants with being aiders and abettors.

In order to aid and abet another to commit a crime it is necessary that an accused willfully associate himself in someway with the criminal venture, and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seeks by some act or omission of his to make the criminal venture succeed.

An act of omission is willfully done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.

You of course may not find a defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the

defendants participated in its commission.

In order for you to find that Mr. La Ponzina aided and abetted Mr. Gentile, the prosecution must prove beyond a reasonable doubt that, one, Mr. Gentile did in fact offer or give a bribe to Teotsos in connection with Mr. La Ponzina's tax returns, and two; that Mr. that Mr. La Ponzina was not only aware and ha knowledge thereof, but actually participated therein and assisted or aided, and abetted Mr. Gentile in making such bribe, and three; that such offer or bribe was a joint venture.

Moreover, if you find that such a bribe was in fact orrered or paid by Mr. Gentile in connection with Mr. La Ponzina's tax return, but that Mr. La Ponzina did not have actual knowledge or was unaware thereof, or did not participate therein, you must acqu Mr. La Ponzina.

Count 4 alleges that Mr. Gentile and Mr. La Ponzina conspired to pay a bribe to Tsotsos in connection with La Ponzina's income tax returns. That is, $1,000 and golf lessons--

MR. KLEIN: One thousand and --

THE COURT: And.

MR. KLEIN: I thought you said, "in."

THE COURT: I said, "and".

MR. KLEIN: I'm sorry. I didn't hear it.

THE COURT: In order for you to find that such conspiracy existed, you must establish beyond a reasonable doubt that Messrs. Gentile and LaPonzina met and agreed to offer such bribe to Tsotsos for such purposes. And I will give you, before I go on further with the conspiracy, the balance of it, I will charge you as to the balance of the conspiracy and give you the essential elements of it and then I will go into the ramifications as to what occurred in this case.

The Court further charges you that mere knowledge that a crime is being committed is not sufficient to establish that the defendant committed a crime.

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of partnership in criminal purposes, in which each member becomes the agent of every other member. The gist of the offen is a combination or agreement to disobey, or to disrega the law.

Mere similarity of conduct among various persons

and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What the evidence in the case must show beyond a reasonable doubt, in order to establish proof that a conspiracy existed, is thatthe members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy; nor that all the means or methods, which were agreed upon, were actually used or put into operation; nor that all of the persons charged who have been members of the alleged conspiracy was such. What theevidence in the case must establish beyond a reasonable doubt

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is that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the indictment; and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy, as charged in the indictment.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

(Continued on next page.)

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Charge of the Court

Before the Jury may find that a defendant, or any other person, has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, willfully participated inthe unlawful plan, with the intent to advance, or further some object or purpose of the conspiracy.

To act or participate willfully means to act or participate voluntarily and intentionally, and with specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say; to act or participate with the bad purpose either to disobey or to disregard the law.

So, if a defendant, or any other person, with understanding of the unlawful character of a plan, knowingly,encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant -- a conspirator.

One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

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In determining whether a conspiracy existed, the Jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, the Jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of its members.

Four essential elements are required to be proved in order to establish the offense of conspiracy charged inthe indictment:

First. That the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged;

Second. That theaccused willfully became a member of the conspiracy;

Third. That one of the conspirators thereafter knowingly committed at least oneof the overt acts charged in the indictment at or about the time and place alleged, and;

Fourth. That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

Charge of the Court

If the Jury should find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete; and it is complete as to every person found by the Jury to have been willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

Again, the overt acts charged in this indictment are:

One. On the 29th day of June, 1972, within the Eastern District of New York, the defendant Ernest LaPonzina and the defendant Joseph Gentile met Nicholas Tsotsos.

Two. On the third day of August, 1972, within the Eastern District of New York, the defendant Joseph Gentile met with Nicholas Tsotsos.

Three. On the eighth day of August, 1972, within the Eastern District of New York, the defendant Ernest LaPonzina met with Nicholas Tsotsos.

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Four. On the ninth day of August, 1972, within the Eastern District of New York, the defendant Joseph Gentile met with Nicholas Tsotsos.

Now, further, inorder for you to find that Mr. LaPonzina was a member of the alleged conspiracy, the prosecution must establish beyond a reasonable doubt that Mr. LaPonzina, aware of its purposes and objects, entered into the conspiracy with the requisite criminal intent; that is, that he knowingly did an act which the law forbids, namely, offenses or bribes purposely intending to violate that law.

Thus, if you find that an offer or bribe was in fact made by Mr.Gentile in connection with Mr. LaPonzina's income tax returns, but that Mr. LaPonzina had nothing to do with such offer or bribe, then you must acquit him.

Thus, if you find that an offer or bribe was in fact made by Mr. Gentile in connection with Mr. LaPonzina's income tax returns, Mr. LaPonzina did not actually know that Mr. Gentile had in fact made such offer or bribe in connection with Mr. LaPonzina's tax returns, then, of course, you must acquit him.

You cannot find that the defendant LaPonzina entered into any conspiracy with Mr. Gentile merely

because you may find that they were good and close friends of long standing. To find that Mr. LaPonzina entered into such a conspiracy with Mr. Gentile, you must be convinced beyond a reasonable doubt that he had the criminal intent to bribe Tsotsos in connection with his own tax returns.

Thus, you cannot find that Mr. LaPonzina entered into any alleged conspiracy even if one existed, merely because you may find that he suggested where free golf lessons could be obtained by potential customers of the gold shop.

To find that he entered the conspiracy charged in the indictment, you must be convinced beyond a reasonable doubt that he had a criminal intent -- that he had the criminal intent -- that the suggestion of where free golf lessons were available was made with the intent of bribing the agent.

Thus, if you find that the suggestion of where free golf lessons could be had was not made with the specific intent to bribe Tsotsos in connection with LaPonzina's tax returns, you must acquit Mr. LaPonzina

Where there is more than one defendant and they are charged with conspiracy, in order to convict either of them with the crime of conspiracy to bribe, you

must first be satisfied beyond a reasonable doubt that each defendant knew of the proposed bribe in advance and thereafter participated therein and did some act in furtherance thereof.

And the acts we are talking about were the overt acts that I read to you.

As I stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The crime charged in this case is a serious crime which requires proof of specific intent before a defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act.

To establish specific intent, the Government must prove that a defendant knowingly did an act which the law forbids, purposely intending to violate thelaw.

Such intent may be determined from all of the facts and circumstances surrounding the case.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing theoperations of the human mind. But you may infer the defendant's intent from the surrounding circumstance

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You may consider any statement made an act done by a defendant, and all other facts and circumstances in evidence which indicate a state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

Now, there are in any case, and in this one, two types of evidence from which a Jury may properly find a defendant guilty of a crime, one is direct evidence such as testimony of an eye witness, the other is circumstantial evidence which is proof of a chain of facts and circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the Jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

A defendant is presumed innocent of the crime. Thus, the defendant, although accused, begins the trial with a clean slate and with no evidence against him, and the law permits nothing but legal evidence to be presented before a Jury to be considered in support of any charge against the accused, so that the

presumption of innocence alone is sufficient to acquit a defendant unless you, the Jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence inthe case.

The questions of the agent are not evidence.

The questions of the agent should be scrutinized to ascertain if, in fact, they are clear and understandable or were they confusing, loaded with double entendre or which provoke incriminatory answers.

The mere fact that any question of "sotsos refers to and assumes that existence of any purported facts, is no proof whatsoever that such a fact does exist.

It is not required that the Government prove guilt beyond all possible doubt. The test if one of reasonable doubt, and reasonable doubt is doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act.

Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important ofyour own affairs

You, the Jury, will remember that a defendant

is never to be convicted on mere suspicion or conjecture. The burden is always on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant. The law never poses upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence

A reasonable doubt exists whenever, after careful and impartial consideration of all the evidence in the case, the Jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge;

So, if the Jury views the evidence inthe case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, you, the Jury, should, of course, adopt the conclusion of innocence.

I have said that the defendant may be proven guilty either by direct or circumstantial evidence; I have said that direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. Also circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. You, the Jury, may make common sense inferences from the proven facts.

It is not necessary that all inferences drawn from the facts in evidence be consistent only with

guilt and inconsistent with every reasonable hypothesis of innocence.

The test is one of reasonable doubt, and should be based upon all the evidence, the testimony of the witnesses, the documents offered into evidence and the reaonsable inferences which can be drawn from the proven facts.

An inference is a deduction or conclusion which reason and common sense lead the Jury to draw from the facts which have been proved. You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from the facts which you find have been proved, such reasonable inferences as seems justified in the light of your own experience.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon the failure of the prosecution to establish such proof.

You as Jurors are the sole judges of the credibility of the witnesses and the weight their testimony

deserves, and it goes without saying that you should scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief.

Consider each witness' intelligence, motive and state of mind, and his demeanor and manner while on the stand.

Consider the witness' ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters.

(Continued on next page.)

Charge of the Court

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In weighing a witness's testimony, you may consider his relationship to the Government or to the defendant, his bias or interest in the outcome of the case; his manner of testifying, his candor and intelligence, as you have observed it; the extent to which he has been corroborated or contradicted by other credible evidence; whether he obeyed the directions of his agency; inconsistencies within his own testimony; his background; and whether he has changed his testimony.

Consider the witness' ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; an innocent misrecollection, like failure

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of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an important detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves. Another test that you can use in determining the truthfulness or credibility of a witness is to use your own good common sense in addition to these essentials that I have given you. You can use your good common sense as you do in your everyday experience where you must make important decisions based upon what others tell you. When you decide to either accept or ignore the statements of others you use your common sense. Your good judgment will say to you somehow or other that whatever they say does not appear to be truthful, that somehow or other you just do not believe what they have said. That is your ability to reason, your ability to determine the truthfulness of the person you are speaking with. Likewise, your common sense should be used to determine the weight to be given the testimony of a witness.

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You take that same good common sense into the jury room, you do not leave it outside. In addition to what I have said, use your common sense as a test in exercising your good judgment and in determing whether or not this defendant is guilty of the crimes charged. It is for you to determine whether the witnesses in this case have testified truthfully, whether or not they have an interest in the case, what that interest may be and how great it is and whether or not they have told you falsehoods. This is all for you to determine.

Every witness's testimony must be weighed as to its truthfulness. If you find any witness lied as to any material fact in the case, then the law gives you certain privileges. One of those privileges is that you have the right to disregard the entire testimony of that witness. If you find, however, that you can sift through that testimony and determine which of the testimony is true and which is false, then the law allows you to take the portions which were true and weigh it and disregard those portions which were false. That again is within your prerogative.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on

either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

You are not obliged to accept testimony, even though the testimony is uncontradicted and the witness is not impeached. You may decide, because of the witness's bearing or demeanor, or because of the inherent improbability of his testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief.

The Government is not required to prove the essential elements of the offense as defined in these instructions by any particular number of witnesses. The testimony of a single witness may be sufficient to convince you beyond a reasonable of the existence of an essential element of the offense charged, if you believe beyond a reasonable doubt that the witness is telling the truth.

The defendants assert that they were the victims of entrapment as to the crimes charged in the indictment. The fact that the government agent merely affords oppor-

tunities to one who is ready and willing to violate the law when the opportunity presents itself does not constitute entrapment. However, in their efforts to enforce the laws, government officers and their agents may not entrap an innocent person who, except for the Government's inducement, would not have engaged in the criminal conduct charged.

Entrapment occurs only when the criminal conduct was the product of the creative activity of the law-enforcement officials or their agents, that is, if they initiate, incite, induce, persuade or lure an otherwise innocent person to commit a crime and to engage in criminal conduct. And if that occurs, the Government may not avail itself of the fruits of this investigation.

If the prosecution has satisfied beyond a reasonable doubt that the defendants were ready and willing to commit the offenses charged and merely were awaiting a favorable opportunity to commit them, then you may find that the Government did no more than furnish a convenient opening for the criminal activity in which the defendants were prepared to engage. In such circumstances, you may find that the Government agent has not seduced innocent persons but has only provided

the means for the defendants to effectuate or realize their own then existing purposes.

On the other hand, if you have a reasonable doubt that the defendants would have committed the offenses charged without the Government's inducement, then it is your duty to acquit them.

If the evidence in the case should leave you with a reasonable doubt whether the defendant had a previous intent or purpose to commit the offense of bribery, as charged in the indictment, apart from the inducement or persuasion of some officer or agent of the Government, then it is your duty to find him not guilty.

In determining whether or not the defendant was unlawfully entrapped, you must weigh all the evidence in the case and if you find some evidence of Government initiation of the illegal conduct, the Government has a heavy burden to establish the defendant's predisposition to commit bribery and must, in fact, establish and prove that the defendant had a prior intent to commit bribery beyond a reasonable doubt.

The term "entrapment" has been defined as the inducement of one to commit a crime not contemplated by him for the mere purpose of instituting a criminal

prosecution against him. It has also been defined as a conception and planning of an offense by an officer and the procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.

You may consider all of the facts taken together with all of the evidence in the case in reaching a determination as to whether or not the defendant has successfully established the defense of entrapment.

There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If an accused be proved guilty beyond reasonable doubt, say so. If not so proved guilty say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case; and

remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

You have heard testimony that Agent Tsotsos, in violation of an administrative regulation of the Internal Revenue Service, failed to advise the defendants of their rights at his initial meeting with each defendant. You must treat this information like any other piece of evidence, that is, you must determine the weight to be given this testimony.

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

The punishment provided by law for the crime charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

The Court further charges you that each one of these defendants and the evidence against each one of these defendants must be separately considered as to what was proffered before you as to each defendant and each one is to either be convicted or acquitted on the

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evidence proffered as to each one.

In determining what the evidence is, you must consider it in the light as it is brought about and stated as to each particular defendant, Mr. Gentile and Mr. La Ponzina separately. The stand before you separately although named in two counts together.

Now, in this type of case there must be a unanimous verdict, that means all twelve of you must agree and it goes without saying that it becomes encumbent upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience whether your fellow juror's argument is one commensurate with yours or whether at least you can with good conscience agree with him. You have no right to stubbornly and idly sit by and say, "I am not talking to anyone. I am not going to discuss it" because people with common sense and the ability to reason must communicate, they must communicate their thoughts. So, anything which appears in the record and about which one of you may not agree, talk it out amongst yourselves and then if you can't agree as to what is in the record, you can ask the Court to have that portion of the testimony read back to you by knocking at the door and giving a note in writing

to the clerk who will present it to the Court and I will bring you into the courtroom.

The foreman will preside over your deliberations, and will be your spokesman here in court.

The form of your verdict will be as follows:

"We the jury" -- if you find the defendant not guilty on all four counts -- "We the jury find the defendant not guilty."

If you find the defendant guilty on any one of the counts they are charged in -- for instance, Mr. Gentile is charged in counts one and two and if you find Mr. Gentile guilty in count one you would say so.

If you find him guilty in count two, you announce that as the form of your verdict.

If you find him not guilty as to count one you would so state and if you find him not guilty as to count two, so state.

If you find him guilty as to count three -- as to Mr. Gentile and Mr. La Ponzina guilty as to count three -- you so state. If you find them guilty as to count four, you make such announcement.

Any count you find them not guilty on you state "We find the defendant not guilty" as to the particular count you are specifying; that is, counts 1, 2, 3, 4.

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You will receive a copy of the indictment so you will know what counts they are mentioned in.

Mr. La Ponzina is not mentioned in counts one and two. He is merely mentioned or charged in counts three and four.

That is the charge of the Court.

(Sidebar discussion.)

MR. KLEIN: When you were giving the example at the end you indicated, although you charged correctly in my opinion, you indicated that it would be a joint verdict on 3 and 4.

THE COURT: No, it can be separate. I will correct it for you. They get a copy of the indictment in any event.

MR. KLEIN: Just the same exceptions I had before.

MR. SCHETTINO: The same.

MR. BARLOW: Your Honor's charge on specific intent, you talked about the natural and probable consequences --

THE COURT: Of their acts. A person knowingly does that which --

MR. BARLOW: There was a case in the Second Circuit about eight years ago, U.S. v. Barash, 365 Fed.

2d 395. That charge was rejected but that was in a case where it was a civil audit, not a criminal tax investigation, so I am not really sure --

THE COURT: No.

MR. BARLOW: We have a different factual situation here.

THE COURT: Yes.

MR. KLEIN: When you were talking about entrapment you said "The defendant." I want to take exception.

THE COURT: I said "defense." That's what I said.

MR. SCHETTINO: The only comment I have, Judge, in keeping with Mr. Klein's statement, is to question whether or not the jury sufficiently understands that there are defenses to crimes and that the defendant, especially Gentile, has exercised this as a defense. It is a legal defense and if they accept it they must acquit.

I thought it was missing, the conveyance to them that defenses to crimes are permitted and this is the defense that was advanced.

THE COURT: No. That is what it says here (indicating).

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MR. SCHETTINO: I think it is at the very end.

THE COURT: No. I don't know how it could be back here.

MR. SCHETTINO: I appreciate that "the defendants assert they were the victims of..."

However, I don't know if they are aware that entrapment is a legal defense.

THE COURT: I agree with you and I will tell them that.

MR. SCHETTINO: It doesn't seem that they understand that.

THE COURT: I agree with you. I will just say that.

This is a very fair charge. It has never been attacked by a court yet. This covers every point. It took me a few years to make this up.

MR. SCHETTINO: I have tried murder cases where I used the defense of self-defense and it is made clear to them that that is a legal defense.

THE COURT: That's state court.

MR. SCHETTINO: Entrapment is a [illegible] defense in the federal court.

THE COURT: Surely.

MR. KLEIN: You are going to tell them they can

14 Charge of the Court

have different verdicts on three and four?

THE COURT: Sure. I thought they understood that.

(Conclusion of sidebar discussion.)

(The following was held in open court.)

THE COURT: There are two matters which I wish to discuss further with you.

First, I discussed the matter of entrapment and I gave you the law on the question of entrapment and you will recall that I wanted to advise you and charge you that entrapment is a legal defense under the law and that the defendants have an absolute right to come in with such a defense. That is absolutely proper to do and it is an absolute defense under the law, the defense of entrapment.

You understand that the form of verdict is that each defendant is being tried separately as to each count. They- are named jointly but you can find either one of the defendants guilty or you can acquit either one of the defendants in any of the counts except the ones that they are not named in.

Now, I will have you all go out to supper. You cannot discuss the case while you are out, only when you come back. I will send the alternates out with you.

* * *

Tape 1
Reel 1
IR:JB
12-2

THE CLERK: At first, we're going to bring the jury in. Note on the tapes, they want to hear the tapes in reference to Count Three as to one thousand dollars and the golf lessons. I understand on two different tapes.

MR. BARLOW: Yes, your Honor. A thousand dollars mentioned twice on the tape of August 3rd and we have it on the machine. The golf lessons mentioned on August 8.

MR. KLEIN: Just a moment.

Your Honor, I'd like that; it says, "Tape," it doesn't say, "tapes."

THE COURT: Mr. Klein, when it gets to this stage, I run the court with the jury. I will ask them when they come out, I will conduct it and I will do everything. I take no suggestions and I'm telling you something. I just don't want to argue with you and I take no suggestions as to what I shall do with this jury at this stage of the proceeding.

From here on, your case is finished. It's now up to the Court what it does with the jury.

MR. KLEIN: TheCourt has no right to give the jury something which they didn't ask for.

THE COURT: Mind sitting down? Thank you.

Bring the jury in.

(The following takes place in the presence of the jury.)

THE COURT: Fine.

Mr. Foreman, this is the last note you sent in; "We would like to hear the tape concerning -- "

Is that --

I'm sorry.

" -- connected with Count Three referring to one thousand dollars and golf lessons."

THE FOREMAN: Yes.

THE COURT: Do you understand that? Do you want to know about the one thousand dollars and you also want to know about the golf lessons?

THE FOREMAN: We want to know about the one thousand dollars.

THE COURT: Then, we'll play that for you at this time.

MR. KLEIN: Could your Honor indicate the date and who is present?

THE COURT: We will.

Is that August 8th the date?

THE FOREMAN: May I look at the counts?

THE COURT: Yes, please.

1-3

THE FOREMAN: This is August 14th or --

THE COURT: Not talking aboutthe count, talking about the date that you're listening to as far as the tape is concerned.

THE FOREMAN: 8th or 9th.

THE COURT: What's that?

THE FOREMAN: 8th or 9th.

THE COURT: Do you have it there?

MR. BARLOW: Your Honor, I have the transcript and we have the tape.

THE COURT: All right.

What's the date?

MR. BARLOW: We have August 30th.

MR. KLEIN: That's not what the jury asked for.

THE COURT: Mr. Klein, please. The jury will tell me if that's what they want when they hear it. You let me know if that's what you want when you hear it.

If you don't, please stop it and then we'll go to something else.

You are the judges as of what you want and no one else can tell you that. You understand that?

THE FOREMAN: Yes.

THE COURT: All right.

While we're waiting for that, I know that you wanted the charge of the Court, full charge of the Court. You could not have that. Any portion of the charge you wish to have read to you, you may.

THE FOREMAN: No, sir. What we wanted, we got, the counts.

THE COURT: The counts; that's all?

THE FOREMAN: That's what you said you'd give us and that's what we wanted.

THE COURT: That's what you got.

Okay.

So, therefore, other than that request we have at this point, there was no other request by this jury?

THE FOREMAN: No, sir.

THE COURT: All right.

MR. SCHETTINO: Judge, may we have a side bar?

THE COURT: I'm going to ask another question in a minute.

(Side bar discussion was held out of the hearing of the jury.)

MR. SCHETTINO: Judge, we are trying to determine what I am trying to determine is with Mr. Barlow,

is where this tape starts. Whether the jury wants the tape in itself.

THE COURT: No, just what --

MR. BARLOW: The reference.

THE COURT: I know what they want.

MR. BARLOW: It's my only question, this is the first mention of a thousand dollars. I was just asking Mr. Schettino if they wanted a lead-in.

THE COURT: Both of those involved Mr. Gentile?

MR. KLEIN: I am looking.

MR. SCHETTINO: I am looking for the redacted tape.

MR. BARLOW: This is 6-A.

MR. SCHETTINO: Where is the one they have been reading?

THE COURT: Where is the redacted ones?

MR. BARLOW: Back in my office.

THE COURT: All of them?

MR. BARLOW: Yes, sir.

THE COURT: What happened to t[illegible] ones I had on my bench?

MR. BARLOW: I must have the redactions.

THE COURT: Give them to me. I don't think

that's what I want, not this.

MR. BARLOW: Here's where it begins on Page 20 of 6-B.

THE COURT: Right here.

MR. BARLOW: And the first very paragraph on Page 21 is the reference to the thousand dollars, the first reference.

THE COURT: This is the redacted one, all this was in.

MR. BARLOW: Right.

THE COURT: None of this?

MR. BARLOW: No, as I said.

THE COURT: Is that --

This is all starts, starting here.

MR. BARLOW: I just want a short lead-in; so they can at least have time to adjust their headphones.

MR. SCHETTINO: I'm not so interested in adjusting their headphones.

THE COURT: Well, we'll find out. Just tell us where to start, please. I'll find out what they're interested in. I've been doing this for years.

MR. KLEIN: I'm going to ask for a limited --

THE COURT: Mr. Klein, please. You are not

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going to get any instructions. You are going to get what the jury wants. Nothing more. I tell you now that's what happens.

I don't retry charges or cases.

MR. SCHETTINO: There --

MR. KLEIN: Your Honor, I'd like to put in other things where he said he didn't want to talk to Ernie.

MR. BARLOW: Your Honor, this jury has asked to hear --

THE COURT: This is what they asked for. They want it they'll ask for it. You cannot give them anything but what they ask for. I'm the judgeof that.

They want all of it, they can have all of it. I don't stop them.

(End of side bar discussion.)

THE COURT: Now, you understand what you're listening to, if it's what you want, you say so. If not, advise the Court and then I will go on to something else and try to find any other part you want to hear. If you want to hear all of it, you have a right to hear that, too; you understand that?

THE FOREMAN: Yes, thank you.

THE COURT: You must make up your mind what you want and no one can tell you that at this stage of the proceeding.

THE FOREMAN: I understand.

MR. KLEIN: If your Honor please, instruct the jury this is August 3rd between Mr. Gentile and Mr. Tsotsos.

THE COURT: August 3rd between Mr. Gantile and Mr. Tsotsos.

(The tape is played to the jury.)

THE COURT: Would you want to write out the next note or would you want to tell me?

THE FOREMAN: One point that seems to be a little bit confusing. The point of the transferring of a thousand dollars from one party to another. That is one party.

THE COURT: I cannot explain to you whatever it is, that's what -- that's why you're listening to the tapes. You must come to the conclusion whether those tapes are explicit as to whether those tapes are conclusive.

THE FOREMAN: Is there a tape for the 9th or the 8th?

THE COURT: Was there a tape for the 8th or hte 9th involving the thousand dollars?

JUROR NUMBER TWO: Eight or nine of August meeting between Mr. LaPonzina and Mr. Tsotsos.

THE COURT: LaPonzina and Tsotsos?

JUROR NUMBER TWO: That's right.

THE COURT: You can hear that. You can hear that in its entirety if you wish.

Now, I want to know what specific part you want to hear. Just the conversation between them in its entirety?

JUROR NUMBER TWO: I think that would clear the problem.

THE COURT: Play that in its entirety.

(Tape played to the jury.)

MR. BARLOW: Your Honor, that's the end of the tape.

JUROR NUMBER NINE: Could we leave for a few minutes, your Honor?

THE COURT: Sure can.

(Jury leaves the courtroom

(A short recess is taken.)

(Continued on next page.)

EXHIBIT--I.R.S. REGULATION.

CCH
TAX MANUAL

Part IX—Intelligence

General Procedures

9384.1
General—Cont.

9384.2
Advice by Special Agents to Subjects of Investigation

(1) Procedures to be followed by special agents in the interrogation of persons in custody are outlined in IRM 9411.

(2) The following procedure will be followed by special agents in their initial non-custody meetings with subjects of investigation:

(a) At the outset of his first official meeting with the subject of an investigation, the special agent will properly identify himself as a special agent of the Internal Revenue Service and will produce his authorized credentials to the subject for examination. The special agent will further state, "As a special agent, one of my functions is to investigate the possibility of criminal violations of the internal revenue laws, and related offenses."

(b) Immediately following that explanation, the special agent will then advise the subject of the investigation substantially as follows:

"In connection with my investigation of your tax liability (or other matter) I would like to ask you some questions. However, first I advise you that under the Fifth Amendment to the Constitution of the United States I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any documents which you submit may be used against you in any criminal proceeding which may be undertaken.

I advise you further that you may, if you wish, seek the assistance of an attorney before responding."

(c) If the subject requests clarification, whether as to his rights or the purpose of the investigation, the special agent will give such explanation as is necessary to clarify the matter for the subject.

(d) If at any stage of an interview the subject indicates that he wishes to exercise his rights to withhold his testimony or records, or to first consult with an attorney, the special agent will terminate the interview.

(e) In each investigation, the special agent will make a contemporaneous memorandum stating when and where the subject was advised pursuant to the above procedures, what additional explanation, if any, was made; how the subject responded; and who was present at the time.

(3) At any official contact with any person the special agent will not use trickery, misrepresentation or deception in obtaining any evidence or information, nor will he use language which might constitute a promise of immunity or settlement of the principal's case, or which might constitute intimidation or a threat.

(4) Other subsections of the Internal Revenue Manual bearing on constitutional rights are:

(a) IRM 9352—Rights of Witnesses
(b) IRM 9363—Use of Summons
(c) IRM 9383—Development of Evidence
(d) IRM 9445—Procedure After Arrest
(e) IRM 9451—Searches With Warrants
(f) IRM 9452—Searches Without Warrants

EXHIBIT--TRANSCRIPT OF TAPE RECORDINGS OF AUGUST 3, 1972.

P 3

? I'll tell you why I wanted to see you.

TSOTSOS: I figured, I figured you'd want to hear the good news right away.

GENTILE: Good news doesn't hurt anybody. Good news doesn't hurt anybody and I wanted to talk to you about--you know about Ernie. I know you've been on him, you've been on him. I dontknow (inaudible) what you're up to or what you're trying to do.

P 4

TSOTSOS: Well what, what's his intentions?

GENTILE: (Inaudible) So eh I told him, Ernie (inaudible) what do you want to do? I mean eh-- So he says "what do you think I should do?" I don't think (inaudible) but I tell you what you looking for (inaudible) what do you have on this guy. There is no checks like you had with me. This guy has got everything in order. He saw his accountant. He, I mean his lawyer that was taking care of it for him. Everything is all right Ernie. He says "Have I got something to worry about". No-no you have nothing to worry about, but I'm telling you I says Ernie look-I don't like, I don't like this thing we don't need it I says as I've told you before (inaudible) is very close to me. You said he was my partner (inaudible) but he is very close to me and naturally whatever I can do for him, I'm going to do for him within my power and eh, when he tells his lawyer not to worry about it, well I don't go by lawyers,----accountants, lawyers, they only talk a good game with their mouths, but I don't go by them, see so I'm asking you now what is it. This what you wanted to talk to me about. About him.

EXHIBIT--TRANSCRIPT OF TAPE RECORDINGS OF AUGUST 3, 1972

P. 5

GENTILE: yeah you telling me--the (inaudible) come around. Tell the guy to come around. What do you think he only got you to worry about.

TSOTSOS: Now, eh, about Ernie what does he want to do?

GENTILE: You talking to me, you're not talking to Ernie you see when you do business with one guy stick to that just one guy. Don't look for anything else. You go to sleep at night you enjoy your wife, you enjoy your kids, and that's it, you don't have to worry about a come back, see so don't do too many things with Ernie because there's got to be some way where you gonna get into trouble. I don't want to see that I'd rather have you safe with me and I'm safe with you.

TSOTSOS: Joe believe me, I'm not pressing you, but uh

GENTILE: As far as, as far as ...

TSOTSOS: I mean, it's up to him, Joe, you know?

P. 9

GENTILE: So now as far as with Ernie, as far as with Ernie, me now (INAUDIBLE) as far as with Ernie, eh, I'll take it myself so remember, so help me God, he doesn't... I didn't even know I'm gonna meet you but I told Ernie, Ernie I says if I see him, I says maybe, if I could help the situation (INAUDIBLE) I don't know what he has on you. "Yeah what could he have on me. My lawyer says, says nothing when he calls you we'll go there and a.. Well why should it come to that, you know. I couldn't (INAUDIBLE) you know everything. Although he is a close friend of mine, but I'm telling you one thing, if I things to myself, nobody could rat on me. If I start telling it to people, now I talk to Ernie but if I tell him now who is he going to tell it to? The next guy (INAUDIBLE) we could take care of that. That guy, we've got him in our pocket.

EXHIBIT--TRANSCRIPT OF TAPE RECORDINGS OF AUGUST 3, 1972

P 20

TSOTSOS: I know you got another appointment. Before we go, what about Ernie?

GENTILE: Well, I'll give you something there (inaudible)

TSOTSOS: Do it without him, eh.

GENTILE: Without him, better for all of us and I'll tell him I took care of it.

TSOTSOS: I don't think that's right.

GENTILE: Well, you see, these are the things you must understand. What is it to you anyway? As long as you're satisfied. You says one thing to me, Joe you ever make another deal, you're my partner. I don't look for that. I don't look for that. I look to see if I could straighten out a friend of mine. Who wants 2,000 you want a 1,000, he wants 500. Who wants 3000 (inaudible) I should pay it, that's what you get; the figure that you gave me. You can't give me a dollar, none of my friends.

TSOTSOS: Yeah but I don't want any misunderstanding. Did you talk it over with him, or what?

GENTILE: I didn't talk it over, I called him, I, if I could do something, I'm going to do it, that's it, that's--but there's nothing there I talked to my lawyer and I---."

TSOTSOS: Then why, why would you want to do this on your own?

GENTILE: Because it's better, better for everyone concerned.

TSOTSOS: Doesn't he see that?

GENTILE: Oh he might. If I tell him well look you can trust Nick--like a son. Don't worry about it. He'll tell you that he knows about your business. He knows you're (inaudible) operating. He knows about this operation. After all you're not pulling the wool over this guy's eyes. All he wants to do is be compensated. But you could trust him; go and sit down. "Yeah I'd be glad to sit down with him." But I don't want to. The least people that knew your business the better off you are.

(Inaudible)

TSOTSOS: I don't feel right about it, you know.

GENTILE: So you want to sit down with him then?

TSOTSOS: Yeah!

GENTILE: You'd rather sit down with him?

TSOTSOS: Rather yeah.

GENTILE: All right, then sit down with him, I won't be there.

EXHIBIT--TRANSCRIPT OF TAPE RECORDINGS OF AUGUST 3, 1972

TSOTSOS: OK

GENTILE: But I tell you, eh, eh, I was willing, here's what I was willing to do, up to 1000 dollars, I was going to say 500, 1000 dollars but I says I dont want to bargain with you, like when you told me (inaudible) that's it, OK I thought it was worth it and that's it, and I thought you didn't ask a ridiculous price, but once you be ridiculous with me then I say we have nothing to talk about and that's it. So I think Ernie's worth a thousand dollars (inaudible) it's as simple as that (inaudible) he has nothing on you. Isn't it better that way?

TSOTSOS: (Inaudible)

GENTILE: (Inaudible)

TSOTSOS: Yeah, yeah.

GENTILE: Ernie makes a salary. He's not a wealthy fellow, let's put let's put it that way. He's in with me on certain things but--but that's all.

TSOTSOS: I don't want to see, I don't want to see you get involved. I don't want to see, you get involved.

GENTILE: How am I going to get involved?

TSOTSOS: Take yourself out of the picture.

GENTILE: How am I getting involved. This is my buddy your talking about.

TSOTSOS: Yeah, but I feel its coming--I don't like that. It bothers me. It bothers me. I'm not that the kind of guy you know.

GENTILE: Well all right then well, here's here's the alternatives that you have. You want me to talk to him (inaudible) meet him (inaudible) I just don't want to many people to know about it, so, naturally he's he's also not a fellow that tells his wife, or his brothers or anything like that (inaudible) or through me, either way. What, what do you want to do?

TSOTSOS: Let me, let me sit down with him.

GENTILE: You want to meet him, then I'll make (inaudible) you want to meet him down there.

TSOTSOS: Yeah, that's probably the best way.

GENTILE: All right then. I don't know why you want to meet him for.

EXHIBIT--TRANSCRIPT OF TAPE RECORDINGS OF AUGUST 3, 1972

P 21

SOTSOS: I feel better about it.

ENTILE: (Inaudible) you should have that much faith in me and that's it. (Inaudible)

SOTSOS: I'd, I'd, I'd rather do it the other way. This way there won't be any misunderstanding.

ENTILE: There won't be no misunderstanding, not when (inaudible)

P 22

SOTSOS: (Inaudible) How about tomorrow?

SOTSOS: Tuesday, Tuesday is good for me.

ENTILE: Tuesday?

SOTSOS: Yeah

ENTILE: Tuesday around 10 o'clock.

SOTSOS: Good

ENTILE: 10 o'clock in the morning. Eh--

SOTSOS: The figure you mentioned sounds good to me.

ENTILE: The figure (inaudible) forget about it, you have, you have something else on your mind, you don't have to meet him.

SOTSOS: I'd, I'd rather do it that way, I'd like to keep it like that.

ENTILE: He won't tell you too much. Ernie won't tell you too much. Like he talked to you that day because of me. He won't talk to you, he won't talk to you like I did (inaudible) I don't want h[illegible] o fence.

SOTSOS: Yeah I don't want that either what the hells the point.

ENTILE: Come down to the point and that's it (inaudible) any reason, any reason you got anything you want to tell him---is there any--- is that why you want to see him.

SOTSOS: Yeah I want to work it out, I want to know exactly what he wants, you know. But you know, what does he want me to do? You know what I mean?

EXHIBIT--TRANSCRIPT OF TAPE RECORDINGS OF AUGUST 3, 1972

P 24

TSOTSOS: That has nothing to do with it.

GENTILE: But its got nothing to do with it. This is criminal action. They want you to prosecute you. All right. I'll make it Tuesday 10:00 oblock.

TSOTSOS: Ten o'clock.

GENTILE: He'll make him ah, now, send him there, he hasn't got the key. I'll give the key to a guy next door and make him open up. A open up the place. Ok, right, you can talk to him by yourself, alone, alright?

TSOTSOS: Good

GENTILE: It will be better.

TSOTSOS: Good

GENTILE: I'll give him an idea. (INAUDIBLE) Ernie look this and this (INAUDIBLE) you do it yourself (INAUDIBLE). Forget about it. You take care of him this way and that's it. You ask him the position you're in. Ask him what you want done. He'll tell you the position youre in, and that's it, and he'll work it out himself. Ok that way?

TSOTSOS: Yeah.

GENTILE: Good, you working on anybody else?

P 25

GENTILE: I'm mainly interested in Johnny Bath Beach, Johnny Oddo.

TSOTSOS: Well talk to him.

GENTILE: I'll talk to his people. I don't go near him. In fact he just had an operation (INAUDIBLE) I don't even know if he wants to (INAUDIBLE) but it will only be done thru you. I won't meet anybody, nobody. You say Joe I want you to meet....no Sir.

TSOTSOS: As long as he tells you what he wants done and there's no misunderstandin (INAUDIBLE).

GENTILE: Oh, yes, you have to (INAUDIBLE)

TSOTSOS: All you have to do is show me that it's not coming from your pocket...Tha bothers me Joe.

EXHIBIT--TRANSCRIPT OF TAPE RECORDINGS OF AUGUST 3, 1972

P 24

GENTILE: See I'll tell you, well let's say, let's put it this way, this is what he's worried about, this is what he wants done and you say yes I could do it, you know, within your power you could do it, ok, and then...

TSOTSOS: You got to tell me, that's what I mean, I can't until I study it you know.

P 25

GENTILE: (INAUDIBLE) And I see now why you want to see Ernie because that's one of the reasons, and the other reason, eh, the thousand it's not coming from my pocket.

TSOTSOS: I want you to know something, I, I only offer a money back guarantee if you know...

GENTILE: Yeah

TSOTSOS: I do my best Joe, but I can't make miracles.

EXTRACT OF TRANSCRIPT
OF TAPE RECORDING OF 8/9/72

P. 3

"TSOTSOS: You know your phone is clear as of the time I told you? I don't know (inaudible) whether it is today but as of two weeks ago when I saw you, your phone was clear"

"TSOTSOS: That's why there's no reason from now on for you not to play it straight. Play it straight. Report the income"

P. 4

"TSOTSOS: The the report oh indicated that, that you might, you might be in trouble with a with a--"

P. 6

"TSOTSOS: Yeah, Joe let me ask you something. Does the name Edwards have any significance to you?

. . .

TSOTSOS, Well theyre' out to nail him. I went you to know that.

. . .

TSOTSOS: Bookmaking? I don't know what the hell his game is.

. . .

P. 7

TSOTSOS: Your name was mentioned along with him and that's why it got my attention.

. . .

P. 8

TSOTOS: No. I'd stay away from him because there watching him very closely. I think theyre' more interested in him than they are in you.

. . .

TSOTOS: But I know they're they're oh hot on his tail and oh you may be oh wise to stay away from him for awhile

NOTICE OF MOTION TO SET ASIDE VERDICT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	
against		72 CR 1232
	:	
JOSEPH GENTILE,		
Defendant	:	

PLEASE TAKE NOTICE that the defendant, JOSEPH GENTILE, hereby moves to have the verdict of the jury herein rendered, vacated and set aside and for a directed verdict of acquittal or, in the alternative, for a new trial, upon the following grounds:

(1) That the defendant was deprived of a fair trial by the introduction into evidence of his possible prior criminal activity.

(2) The issue of the defendant's intent, motive, knowledge, or design was erroneously and prejudicially introduced as evidence of his predisposition to commit the crimes as alleged in the indictment.

(3) The prosecutors remarks during the course of the trial and in his summation were prejudicial and inflammatory and denied defendant due process of law.

(4) The jury was permitted to listen to testimony redacted and omitted at the pretrial hearing.

(5) On all of the other grounds and reasons as set forth in the Federal Code of Criminal Procedure.

The defendant respectfully requests that the motion be returnable Friday, February 28,1975 at 10 a.m.

NOTICE OF MOTION TO SET ASIDE VERDICT

Dated: February 24,1975

Yours,etc.,

JOHN C.SCHETTINO
Attorney for Defendant
O & P.O.Address:
301 Franklin Avenue
Hewlett,N.Y.11557

NOTICE OF MOTION TO VACATE.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA :

72-CR-1232

:

-against-

: MOTION TO VACATE

JOSEPH GENTILE and
ERNEST LA PONZINA, :

Defendants. :

- X

TO THE HONORABLE MARK A. COSTANTINO
DISTRICT JUDGE:

The defendant ERNEST LA PONZINA moves this Court to vacate and set aside the jury verdict and for a directed verdict of acquittal upon the following grounds that such verdict is:

I. Contrary to the weight of credible evidence.

II. Contrary to law, in that:

(A.) The defendant cannot be guilty of bribery under 18 U.S.C. 201(b) inasmuch as the official sought to be bribed, had no responsibility for the acts sought to be influenced;

(B.) There was insufficient independent evidence of the defendant's alleged knowing participation in the purported crime to submit to the jury;

(C.) Upon the grounds of double jeopardy in that the declaration of a mistrial upon motion made by counsel for the co-defendant in which this

defendant refused to join and had no standing, after jeopardy had attached, barred the trial of this defendant before the newly selected jury;

(D.) A trial severance should have been granted to the defendant when the third co-defendant was severed;

(E.) The defendant was deprived of his constitutional right of confrontation, inasmuch as a fatal and substantial variance existed between the indictment and proof;

(F.) The defendant was deprived of his constitutional right against self-incrimination and denied due process because of the refusal and failure of this Court to suppress his incriminatory statements, declarations and admissions upon the grounds that the Special Agent failed and refused to advise the defendant of his rights as required by Internal Revenue Service regulations;

(G.) The judge erroneously invaded the privacy of the jury after it had commenced deliberations and interfered therewith by gratuitously submitting additional matter to them, although not requested by them.

(H.) Upon the grounds of collateral estoppel and double jeopardy in that the Court erroneously submitted both counts 3 and 4 to the jury, instead of dismissing one of such counts or requiring the prosecutor to elect one of such counts for submission to jury;

NOTICE OF MOTION TO VACATE

(I.) The Court's charge to the jury was inadequate and prejudicial; and

(J.) The failure of the Court to charge the jury as requested by the defendant.

III. The defendant joins in any motion to vacate and set aside the jury verdict that may be made on behalf of the co-defendant.

Argument of the within motion is requested to be held on Wednesday, January 29, 1975 at 10 A.M.

Dated: New York, New York
January 25, 1975

Yours, etc.

IRWIN KLEIN, P.C.
Attorneys for Defendant
Ernest La Ponzina
Two Park Avenue
New York, New York 10016
(212) MU. 3-0054

Irwin Klein

IRWIN KLEIN
(Of Counsel)

ORDER DENYING MOTIONS TO VACATE AND SET ASIDE VERDICT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE UNITED STATES : 72-CR-1232

v. : MEMORANDUM and ORDER

JOSEPH GENTILE and ERNEST LA PONZINA : MAY 15 1975

Appearances:

Gerald McGuire, Attorney-in-Charge, Organized Crime and Racketeering Section, by Fred F. Barlow, Special Attorney, for the United States

Irwin Klein, Two Park Avenue, New York City, for defendant LaPonzina

John C. Schettino, 301 Franklin Avenue, Hewlett, New York, for defendant Gentile

COSTANTINO, D.J.

ORDER DENYING MOTIONS TO VACATE AND SET ASIDE VERDICT

These are motions pursuant to Rules 29 and 33, Fed.R.Crim.P. by defendants Joseph Gentile and Ernest LaPonzina for orders setting aside the verdicts against them and entering judgments of acquittal or, in the alternative, for a new trial. Defendant Gentile was found guilty on counts one, two, three and four; defendant LaPonzina was found guilty on counts three and four. Counts one, two and three charged, in substance, that defendants offered and gave a bribe to Internal Revenue Service Agent Nicholas Tsotsos in violation of 18 U.S.C. § 201(b). Count three also charged that defendants aided and abetted bribery in violation of 18 U.S.C. § 2. Count four charged that LaPonzina and Gentile conspired to bribe Tsotsos in violation of 18 U.S.C. § 371.

Motions for a Judgment of Acquittal

Rule 29, Fed.R.Crim.P., provides that on motion of a defendant the court shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment if the evidence is insufficient to sustain a conviction of such offense or offenses. The following are the essential elements of 18 U.S.C. § 201(b), whose violation was charged

in counts one, two and three: first, the act or acts of directly or indirectly offering or promising to a public official a sum of money or thing of value, as charged in the indictment; second, doing such act willfully and corruptly; third, doing such act or acts with intent to influence some official act of the public official as charged. Devitt and Blackmar, Federal Jury Practice And Instructions § 27.05. On a motion for a judgment of acquittal, the court must view the evidence in the light most favorable to the government. 8 Moore's Federal Practice ¶ 29.09. The court's inquiry on a motion for a judgment of acquittal should be whether the reasonable mind of a juror could draw such an inference from the evidence so that he might fairly conclude guilt beyond a reasonable doubt. United States v. Brawer, 482 F.2d 117, 127 (2d Cir. 1973); United States v. Taylor, 464 F.2d 240, 244-45 (2d Cir. 1972). Here, there is ample evidence in the trial record to allow a reasonable juror fairly to conclude that Gentile willfully and corruptly offered Agent Tsotsos $3000 in cash with intent to have Tsotsos act in violation of his duty with respect to a criminal tax investigation of Gentile as charged in counts one and two, e.g., Tsotsos's testimony

of being offered and receiving the $3000 bribe (Record at 157, 241-42). In addition, there is sufficient evidence in the record to satisfy the Brawer and Taylor test with respect to Gentile's conviction under count three for offering things of value to Tsotsos to improperly influence the latter's investigation of LaPonzina; e.g., Record at 290 and 340.

The same conclusion as to sufficiency of evidence may be reached with respect to LaPonzina's conviction on count three for violating 18 U.S.C. § 201(b). Tsotsos testified that on June 29, 1972, he told LaPonzina that he was conducting a tax investigation of LaPonzina's return. In an August 3 conversation, Gentile indicated to Tsotsos that terminating LaPonzina's tax case was worth a bribe of $1000 (Record at 290). The agent testified that when LaPonzina met him on August 8, LaPonzina stated to him that the deal suggested by Gentile was "all right" and that Gentile would give Tsotsos the money (Record at 311). Tsotsos testified that LaPonzina also made a gesture, rubbing his thumb and forefinger together, to indicate that the bribery arrangement was acceptable to LaPonzina (Record at 310). According to Tsotsos, he received $1000 on August 9 from

Gentile after Gentile told Tsotsos that Gentile hoped Tsotsos was satisfied with the results of his meeting with LaPonzina (Record at 340). The jury could reasonably infer that the $1000 bribe was paid with LaPonzina's money rather than Gentile's (see, for example, Record at 292). Tsotsos also testified to LaPonzina's offer of free golf lessons (Record at 331). A reasonable juror might fairly conclude on the basis of the foregoing evidence, together with the other evidence adduced at trial, that defendant LaPonzina was guilty beyond a reasonable doubt of violating 18 U.S.C. § 201(b).

To violate the aiding and abetting statute, 18 U.S.C. § 2, the accused must willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something he wishes to bring about. Devitt and Blackmar § 11.08. The testimony recounted above, together with other evidence introduced at trial, was sufficient to allow a juror to reasonably find the defendants guilty beyond a reasonable doubt on count three for violating 18 U.S.C. § 2 by offering and giving Tsotsos $1000 with intent to influence Tsotsos to act in violation of his duty with respect to the tax investigation of

LaPonzina.

Defendants are charged in count four with violating 18 U.S.C. § 371. The essential elements of § 371 are as follows: first, that the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged; second, that the accused willfully became members of the conspiracy; third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and fourth, that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged. Devitt and Blackmar § 29.08. The jury could reasonably infer from the portions of Tsotsos's testimony summarized above that on or about June 14, 1972 Gentile and LaPonzina willfully formed a conspiracy to give things of value to Tsotsos with intent to influence him in his tax investigation of LaPonzina. Tsotsos testified to the overt acts alleged in the indictment; e.g., the August 8 meeting between LaPonzina and Tsotsos (Record at 308-311). A juror could reasonably infer that this meeting, at which LaPonzina informed Tsotsos of his willingness to pay the bribe, was in furtherance of the con-

spiracy. Thus, there is no merit to defendants' contention that a judgment of acquittal must be directed because of insufficient evidence.

Defendant LaPonzina contends that his motion for a judgment of acquittal should be granted because of a substantial variance between the indictment and proof. He argues that because Tsotsos was not a member of the tax audit staff, Tsotsos could not be bribed in violation of 18 U.S.C. § 201. Assuming, arguendo, that substantial variance between the indictment and proof is a proper ground for granting a motion for a judgment of acquittal (see Wright, Federal Practice and Procedure § 466), it should be noted that the federal bribery statute covers "any situation in which the advice or recommendation of a Government employee would be influential, irrespective of the employee's specific authority (or lack of same) to make a binding decision." United States v. Carson, 464 F.2d 424, 433 (2d Cir. 1972), cert. denied, 409 U.S. 949 (1972). It may reasonably be inferred from the evidence that as an Internal Revenue Service Special Agent, Tsotsos was able to make an influential recommendation as to whether LaPonzina should be prosecuted for violation of the internal

revenue laws. It follows that offering him a bribe violated 18 U.S.C. § 201. Accordingly, there was no variance between the indictment and the proof adduced at trial.

Defendant LaPonzina presents a number of additional grounds in support of his motion for a judgment of acquittal. But these are not valid grounds for a motion for a judgment of acquittal, see Wright, supra at § 466; accordingly they are considered in support of the motion for a new trial.

Motions for a New Trial

Rule 33, Fed.R.Crim.P., provides that the court may grant a new trial to a defendant if required in the interest of justice. The decision to grant or deny the motion is largely within the discretion of the trial court and such motions "are not favored and should be granted only with great caution." United States v. Lombardozzi, 343 F.2d 127, 128 (2d Cir. 1965), cert. denied, 381 U.S. 938 (1965); United States v. Costello, 255 F.2d 876, 879 (2d Cir. 1958), cert. denied, 357 U.S. 937 (1958). On a motion to set aside the verdict as against the weight of the evidence and to

order a new trial, the court may consider the credibility of government witnesses. 8 Moore's Federal Practice ¶ 29.09.

A. LaPonzina's Motion For A New Trial

1. Insufficient proof that LaPonzina knowingly joined the conspiracy

Defendant LaPonzina raises a number of grounds in support of his Rule 33 motion. He contends that there is insufficient proof that he knowingly joined the conspiracy. This contention is, however, not substantiated by the record. Tsotsos's testimony as to his August 8 conversation with LaPonzina furnishes one example of evidence that LaPonzina knowingly joined the conspiracy. According to Tsotsos, on August 8 LaPonzina expressed his desire to have the investigation of his tax return ended and whispered to Tsotsos that Gentile would pay Tsotsos the bribe money (Record at 311).

2. Double Jeopardy

LaPonzina contends that his rights under the Double Jeopardy Clause of the Fifth Amendment were violated. His claim is based on the following: The prosecutor made improper

reference to the defense of entrapment in his opening statement to the jury (Record of December 3, 1974 at 63). Counsel for defendant Gentile subsequently made a motion for a mistrial in which counsel for LaPonzina refused to join.

In determining whether to declare a mistrial and order a new trial, this court employed the following test:

> taking all the circumstances into consideration, [whether] there is a manifest necessity for the act [of declaring a mistrial and ordering a new trial], or the ends of public justice otherwise would be defeated [by a failure to so act].

Illinois v. Somerville, 410 U.S. 458, 461 (1973) and United States v. Perez, 9 Wheat. 579, 580 (1824). In Somerville, the Court indicated that the ends of public justice would be defeated by a failure to declare a mistrial and order a new trial if a conviction would have to be reversed on appeal due to an obvious procedural error, 410 U.S. at 464. Here the prosecutor's opening remarks made reversal on appeal a virtual certainty in the event of a conviction. Accordingly, to prevent a defeat of the ends of public justice a mistrial was declared and a new trial ordered. (Record of December 3

at 77). In this court's judgment, LaPonzina's new trial clearly did not violate his rights under the Double Jeopardy Clause.

3. Motion to Sever

Defendant LaPonzina contends that the court erred in denying one of his motions to sever. The facts underlying this claim are as follows: On LaPonzina's motion, he was severed on June 29, 1973 from his codefendants Gentile and Lucadana. Subsequently, LaPonzina informed the court that he wanted a joint trial. Shortly before the joint trial was to begin, counsel for defendant Lucadana became seriously ill (Record of November 20, 1974 at 3). On the government's motion, Lucadana was severed. Defendant LaPonzina's subsequent motion to sever his trial from that of Gentile was denied. It is claimed that this denial was an error.

It should be noted that prior to the time LaPonzina's second motion to sever was made, the court heard tape recordings and read transcripts of conversations involving Gentile, LaPonzina, and Tsotsos which the court had not heard or read at the time of deciding the earlier motion to

sever. These tapes and transcripts were reviewed in the course of pretrial proceedings to determine the admissibility of certain portions of the tapes. These tapes and transcripts made clear the close factual relationship between the crimes with which Gentile and LaPonzina were charged.

A motion to sever is directed to the sound discretion of the trial court. Opper v. United States, 348 U.S. 84, 95 (1954); United States v. Jenkins, 496 F.2d 57, 68 (2d Cir. 1974). To be entitled to a severance order, defendant must show that a joint trial will result in "substantial prejudice" to him. United States v. Calabro, 467 F.2d 973, 987 (2d Cir. 1972), cert. denied 410 U.S. 926 (1973). Counsel for LaPonzina contended, in substance, that substantial prejudice would result to his client because evidence introduced against Gentile would "spill over" against his client. In this court's opinion, there was no reason to assume that a jury would be unable to consider evidence in this case in a proper fashion. Accordingly, it was concluded that LaPonzina's counsel failed to show substantial prejudice. This conclusion still seems correct and denial of the second motion to sever was not an error.

4. Internal Revenue Service Procedure

Defendant LaPonzina contends that Tsotsos's failure to follow Internal Revenue Service general procedure requires a new trial because certain of his statements made to Tsotsos should have been suppressed. This procedural guideline, which is found in the Internal Revenue Manual, Part IX, Section 9384.2, directs investigators to advise taxpayers under investigation at the time of initial contact of specific rights which they have under the Fifth Amendment; these rights include most of those specified in Miranda v. Arizona, 384 U.S. 436 (1966). Here, Tsotsos advised LaPonzina at the time of initial contact that he was investigating LaPonzina for criminal tax violations (Record at 279), but did not provide LaPonzino with the warnings given in the procedural guideline.

La Ponzina's contention that his statements should have been suppressed is supported by United States v. Leahy, 434 F.2d 7 (1st Cir. 1970) and United States v. Heffner, 420 F.2d 809 (4th Cir. 1969). His theory was rejected in United States v. Fukushima, 373 F. Supp. 212, 218 (D. Hawaii, 1974). No Second Circuit decisions on point have come to

the court's attention.

To determine whether LaPonzina was deprived of his privilege against compulsory self-incrimination by the failure to suppress his statements, this court is guided by the reasoning expressed in Michigan v. Tucker, 417 U.S. 433 (1974).The central issue in Tucker was whether the police conduct in the case deprived defendant of his privilege against compulsory self-incrimination. In resolving this issue, the Court first compared the historical circumstances underlying the privilege with the police conduct in question. These historical circumstances include the use of harsh means of interrogation like those employed by the ecclesiastical inquisitions and the Star Chamber "even if not in their stark brutality," 417 U.S. at 440, Ullman v. United States, 350 U.S. 422, 428 (1956). The Court concluded that the particular police conduct complained of bore no resemblance to the historic origins of the privilege. Here, the interrogation of LaPonzina bore no resemblance to the historic evils whose recurrence the privilege was designed to prevent. The evidence indicates that LaPonzina was free to answer or not answer questions. He was free as well to leave the agent's presence at any time. The settings of the conversations

were not coercive. As noted above, he was advised from the outset that the agent was conducting a criminal tax investigation of him.

The second consideration advanced in Tucker was whether the evidence should be excluded because coercive police conduct made it untrustworthy, 417 U.S. at 448; e.g., evidence obtained as a result of the use of third degree torture, Brown v. Mississippi,297 U.S. 278 (1936), or prolonged isolation from family or friends in a hostile setting, Gallegos v. Colorado, 370 U.S. 49 (1962). Here LaPonzina's incriminating statements are not untrustworthy evidence of the type discussed in Tucker, 417 U.S. at 448.

The Court also observed that in determining whether evidence should be suppressed it must, in balancing interests, "weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." Tucker, 417 U.S. at 450. Weighing this interest and in view of the other considerations given in Tucker, it is concluded that LaPonzina was not deprived of his privilege by admitting into evidence his statements to

Tsotsos.

Mathis v. United States, 391 U.S. 1 (1968), a case involving an Internal Revenue Service agent's failure to provide Miranda warnings, is distinguishable since the suspect in Mathis was in custody at the time of questioning. Here, LaPonzina was not taken into custody or deprived of his freedom in any significant way at the time of questioning.

5. Playing of Tapes to Jury

Defendant LaPonzina contends that the court erred in choosing the tapes to be played in response to a jury note requesting the tape referring to "$1000and golf lessons" (Court Exhibit 4). The August 3 tape was played since it contained Gentile's statement to the effect that terminating the tax case against LaPonzina was worth a bribe of $1000 (Record at 1046-1048). The jury subsequently requested that additional tapes be played. That request was complied with (Record at 1048-1050). Thus, there was no error with respect to the playing of tapes.

6. Dismissal of Counts and Alleged Errors in Jury Charge

Defendant LaPonzina contends that either the third

or fourth counts must be dismissed because of the "'same evidence' rule, duplicity and multiplicity." Count three charges LaPonzina with the substantive violation of offering and giving a bribe as well as with aiding and abetting. Count four charges LaPonzina with conspiracy to give a bribe. In this court's judgment, LaPonzina could properly be found guilty under count three of the substantive offense and also under count four of conspiracy to commit the crime. The general rule is that "a conspiracy and the substantive offense that is its immediate end are discrete crimes for which separate sanctions may be imposed." Ianelli v. United States, 43 U.S.L.W. 4423, 4424 (S. Ct., March 25, 1975). One recognized exception, known as Wharton's Rule, is inapplicable since it applies "only to offenses that require concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because both require collective criminal activity" (emphasis in original), Ianelli, 43 U.S.L.W. at 4428. The substantive offense with which LaPonzina was charged, 18 U.S.C. § 201, does not require collective criminal activity; i.e., an individual may offer a bribe.

Sealfon v. United States, 332 U.S. 575 (1948), relied on by defendant LaPonzina, is distinguishable since the case involved two successive trials, at the second of which the crux of the prosecutor's case was an alleged agreement necessarily found to be nonexistent in an earlier trial.

Finally, LaPonzina contends that the court made certain errors in its charge. After careful review, it is concluded that this contention is without merit.

B. Gentile's Motion For a New Trial

Defendant Gentile raises questions in his motion for a new trial which are less substantial than those raised by LaPonzina; for example, Gentile contends that the prosecutor prejudiced him by the manner in which the prosecutor defended his integrity after it was attacked by LaPonzina's defense counsel. The latter in his summation accused the prosecutor of suggesting a lie to a key government witness (Record at 905). LaPonzina's defense counsel used a story about a child caught by his mother with jam on his face and fingers to illustrate the contention that the prosecutor's wrongful conduct should be apparent to the jury ("Isn't there jam on [the prosecutor's] face. . .

Record at 905). In his summation, the prosecutor used the same story to defend his personal integrity and that of the prosecution. With respect to the latter, he named several agents and officials of the Organized Crime Strike Force who were involved at various stages of the investigation and prosecution ("if there is jam on my face and. . . on Agent Tsotsos's face. . . doesn't the jam have to be spread upon Mr. King, upon the four to six agents out there in the surveillance cars. . . on Mr. Shanley. . . on Mr. Dillon's face. . . I want you to hold myself. . . and everybody else who participated in this prosecution to the high. . . standard you have a right to expect. . . ." Record at 953-54). Where defense counsel attacks the integrity of the prosecutor, the prosecutor must have some latitude to respond, see United States v. Bivona, 487 F.2d 443, 447 (2d Cir. 1973). Although the particular statements made by the prosecutor here were properly objected to by defense counsel, the question is whether in view of the context of all that occurred at trial the statements substantially prejudiced Gentile's right to a fair trial. Bivona, 487 F.2d at 447. Here, immediately after the prosecutor's remarks were made, the court advised the jurors to disregard them

(Record at 954). In view of this and the overwhelming evidence of Gentile's guilt, including tape recordings of incriminating conversations, no substantial prejudice was caused by these remarks. All of the other contentions of defendant Gentile in support of his Rule 33 motion are equally without merit. In view of the foregoing, defendants' motions are denied in all respects.

U. S. D. J.

THE CLERK: Criminal case for sentence, Joseph Gentile and Ernest La Ponzina.

MR. SCHETTINO: I am Mr. Schettino. I appear on behalf of the Defendant Joseph Gentile.

It your Honor pleases, I was handed this morning by Mr. Barlow a letter dated May 28, 1975 addressed to James J. Haaran, United States Probation Department, Federal Courthouse, Brooklyn, New York, which letter refers to the attached and accompanying a memorandum indicating that it is a supplemental memorandum being submitted for the consideration of the sentencing of both Joseph Gentile and Ernest La Ponzina.

I should like to state that in 26 years of practicing law it is the most insidious report that I have had the right to examine. The report is replete with hearsay; replete with misstatements; and replete with untruths.

I should like to specifically refer to that portion of the report that refers to "Mr. E." as an informant who categorically says that Mr. Gentile and Mr. La Ponzina were in the Neapolitan Noodle on August 11, 1972 at a time when I believe three homicides were committed.

Now, I vehemently deny that. I label it as a

* * *

MR. SCHETTINO: If your Honor please, how so-ever it may be, on Tuesday of this week when I ascertained this matter was on for sentence and I was permitted the probation report, the last page of that probation report contains a statement, and may I quote this in its substance because I do not have it in front of me, and it contains a statement to the effect --

THE COURT: Do you want it?

MR. SCHETTINO: No, I think, Judge, if I can get the substance across for the record it will satisfy my objection to this.

THE COURT: Go ahead.

MR. SCHETTINO: The very last page of that probation report alludes to the fact that Mr. Gentile's house revealed the presence or evidence of what appeared to be a loan-sharking operation in the amount of approximately $550,000. The probation report further went on to say that Mr. Gentile had a certain sum of money in his possession, and from all of this it would appear that this defendant is heavily involved in illegal operations.

I label that a sheer stark hearsay without any foundation whatsoever.

I further vehemently complain that any such information of that sort was derived from evidence

that was suppressed in this courtroom involving the case in which Mr. Barlow was the prosecutor.

And I now for the record seriously question why that evidence was ruled illegal.

Your Honor, I am sure is acquainted with what happened there. There was a surveillance, electronic surveillance made, and the tapes were not sealed and because of that fatal defect that evidence was ruled inadmissible in any court in this state or any other state. And in fact this matter came up during the course of this trial in an indirect fashion, and your Honor said and ruled properly so, that none of this evidence is permissible, admissible, and I do not want to hear anything about it. We are now confronted with the most insidious reports here using all of this evidence that has been ruled inadmissible before any court in the land and before any jury in the land. And Your Honor had said on this trial, and very properly ruled, that it is not relevant and I do not want to hear about it. Now, we have the Government coming in on this question of sentence and using this tainted evidence, if it is evidence. And I now wonder and I seriously question the tactics of the Government, whether that was a mistake, truly a mistake, by prosecutors of eminent standing and of many years of

practice in this court, whether they made a mistake and forgot to seal those tapes, or whether there was a purpose behind that alleged mistake, because when I looked at what has now been handed to me nothing alludes to the case we tried in front of your Honor, the bribery case. I have done a report here talking about the Neapolitan Noodle. I have got a report here replete with loan-sharking activities. And I refuse to permit a defendant to be sentenced on this type of information. I demand that the prosecutor come forward, and I want to know who "Mr. E" is, and who "Mr. A" is, and who "Mr. B is. I want the Assistant District Attorney Tannenbaum here, and I want him under oath to testify that he told Mr. Gentile that we know you were never in the Neapolitan Noodle.

So I submit, your Honor, that this breaches every ethic of fairness, and no matter what these reports say, these gentlemen are entitled to fairness on this sentence and they are not getting that.

On behalf of the Defendant Gentile I respectfully demand that they have complete hearing on every allegatio contained in the report handed to me this morning --

THE COURT: Well, you are entitled to a hearing on the allegations which you say are not consistent or are incorrect. You are also entitled to have those

matters revealed as to where the information was obtained. But the probation report in and of itself is for the purpose of determining, number one, the character and personality and background of the individuals to be sentenced by the Court. There is no other way that the Court can possibly sentence persons except to know their particular background. Now matters of hearsay are placed in the probation report. It is different from hearsay that may be propounded before the Court on questions of evidence for the purpose of convicting the defendant. This is only for the purpose of eliciting whether or not certain facts are important for the Court to weigh to determine within its discretion with respect to independent knowledge and other reasons of sentencing on the date of sentence.

MR. SCHETTINO: Judge, I appreciate that and I appreciate the heavy burden that is on your HOnor in this case --

THE COURT: In this case or any other case. It doesn't make much difference.

MR. SCHETTINO: But I think in fairness, since your Honor has admitted to me now that part of your sentencing process is to make a valued judgment of the character of these people, I think it is totally

improper to hand me a report and allude to -- we were playing the same game that we played with the tapes. Mr. Barlow is in love with the alphabet. We did that with the tapes. Now I have a "Mr. E" and a "Mr. A", a "Mr. B" and a "Mr. C" in this report with allegations that are totally unfounded.

Now, if it is going to affect your Honor in his judgement, and I may be sticking my arm out a mile long, and I at this point don't care, but I'm not going to stand here -- now your Honor well knows I submitted my own report to your Honor --

THE COURT: I have it.

MR. SCHETTINO: -- that wasn't done in a flippant fashion. It was done by interviewing Mr. Gentile, by interviewing friends of his, and I will be glad to bring them in. I have in my report I submitted on letters, 40 to 50 of them. There are names on those letters. And Mr. Barlow and the Government is permitted to go out and interview those people. But I am not going to accept this, he hands me the alphabet from A to Z and tells me that Mr. A says he was in the Neapolitan Noodle when he wasn't there, and when the Assistant District Attorney in Manhattan tells me he wasn't there -- I can't permit this to affect your HOnor's judgment.

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So we don't have hearsay here. We have informant information very definitely. As to the last page in the original presentence report, outline of evidence that was seized from Mr. Gentile's home, is completely false that that evidence was suppressed in 73 CR 524. That was a gambling case. Mr. Dillon sent a letter to counsel saying that he thought the evidence might not be disclosed because of Title 3. And eventually, I believe on January 18th or 19th, 1974, the case was dismissed. There was no suppression. As a matter of fact after that case was dismissed there have been two cases, one in the Third Circuit and I believe the other in the District of Maryland, that have held that the nondisclosure which was the basis of the dismissal of the indictment in that case does not mean suppression. And in any event I and the agents -- excuse me, I shouldn't say the agents -- I have gone over the probable cause for the search warrant of Mr. Gentile's house, and the information independent of the electronic surveillance in that case, and the Government considers it was sufficient probable cause for the issuance of the search warrant in that case. It is for that reason that I gave that information to the probation officer.

Finally, I think the Court knows, but I will

remind defense counsel, that Section 3577 of Title 18 states in substance that there is no limit whatsoever on the nature of information to be given to the sentencing judge for the determination of the defendant's background, character, etc.

MR. KLEIN: Your Honor, may I speak on this memorandum that has been submitted by the Government.

Your Honor, I waS the attorney in that very case. It was United States against Amato and about 20 others. And I successfully made the motion --

THE COURT: I wasn't the judge?

MR. KLEIN: No sir.

MR. BARLOW: That was before Judge Travia and Judge Bartels.

MR. KLEIN: Judge Bartels. Judge Travia, who was handpicked by the prosecutor instead of coming out of the hopper on the theory that it was a related case, and I move to disqualify Judge Travia and he granted my motion. And then Judge Bartels eventually had the case and dismissed it. Judge Bartels was the one who dismissed it. Now, what happened there was Mr. Gentile's house and other places had been under surveillance by the FBI, the IRS and everybody.

The rule provides that when you do have authorized wiretaps they must be sealed properly. They

must be given to the ordering judge to seal them. The prosecutor in that case was Mr. Barlow. Mr. Barlow did not submit the tapes to the Judge for sealing.

What happened then was on the eve of trial Mr. Dillon, who was Mr. Barlow's superior, wrote a letter, and I am quoting from a portion of it:

"...I have concluded that the failure of the Government to adhere to the provisions of 18USC2518(a) renders such evidence and the fruits thereof inadmissible at the trial of this case..."

Mr. Dillon notified all defense counsel that he would move to dismiss or suppress. And he wrote to Washington, to his superiors there, but apparently they didn't go along with him. Whereupon I made a motion on behalf of all defendants to suppress and dismiss the indictment. And tha indictment was dismissed. I have a copy of my memorandum of law here. The indictment was dismissed.

Now, if there was independent evidence other than the tapes the indictment would not have been dismissed. There was no independent evidence offered. Why didn't the Government say we had independent evidence? The only reason the indictment was dismissed is because the tapes were inadmissible and the whole

Government's case --

THE COURT: You will agree I cannot speculate as to the particular reason or the number of reasons that might have been in the Judge's mind who dismissed the indictment. There is no written opinion.

MR. KLEIN: No your HOnor.

THE COURT: No written opinion. I will not speculate as to any particular reason the Judge might have dismissed any action. There may be numerous reasons that he kept to himself for dismissing the indictment.

MR. KLEIN: Except if you make a motion to dismiss on the ground A, that's all, just one ground, and the Judge grants your motion, motion granted. Indictment dismissed. You must assume he is dismissing it because of the ground that you urge and not anything else.

Now we have a situation here that since it was dismissed -- at the beginning of this case if your Honor recalls I made another motion just at the eve of trial. I moved to suppress all the evidence in this case on the ground that tainted and it came from the evidence in the other case. At that time I recall Mr. Barlow saying, "It is not related." Your Honor then denied my motion.

THE COURT: Well, none of it came in in this case anyway.

MR. KLEIN: No, it didn't come in in the case, I agree. Your Honor kept it out of the case. But the case is not tried yet, not until sentence. That is the judgment of conviction. We are still on trial here. If it can't come in for trial purposes how can it come in for sentence purposes. And that's what he is doing here. He is a man who opened the door. And I question his motives. I think he is too good a lawyer to overlook something like that. If a member of the New York Bar, which Mr. Barlow is not I understand, would do a thing like that he would be up before the Grievance Committee. Holding evidence out instead of complying with the law, and then to use it for his own purposes in this case because he got licked on the other case. I think it is unfair to color a judge's mind or come in with this sort of intimidation. This is worse than looking at Elliot Ness. That is what it comes down to here. It is all conjecture anyhow.

Now just on that point, and I am limiting it to that point, in addition to what Mr. Schettino pointed out which I join in of course. So far as Mr. La Ponzina is concerned Gentile says he is partners with La Ponzina.

I deny it. That's not my recollection. There was a denial.

He says here that La Ponzina was less talkative than Gentile. I will consent to that.

Never admitted directly that he was Gentile's partner. Look at the sophistry of words here. Mr. La Ponzina denied he was a partner four times in a row, and I recall that part. "I am not his partner; I am not his partner." Everytime Tsotsos tried to put the words in his mouth, as it comes across on the tapes, he denied it. Why aren't they candid to say that?

Then later on he says here that based upon their experience and the evidence of the gambling and of loan sharking of La Ponzina and Gentile -- now the loan sharking and gambling, that was the other case, your Honor. So here he has got the suppression evidence here. He says based on that illegal evidence the agents believed -- that is Mr. Barlow talking -- he knows what is in somebody's mind. The agents believe that a strong inference exists that Special Agent Tsotsos was bribed a thousand dollars to stop an investigation of La Ponzina, etc. That is not an inference but it is speculation and it is rank hearsay.

MR. SCHETTINO: May I just briefly make a

closing remark on this report that Mr. Barlow gave me and which because of my limited command of the English language, insidious is the best word at this moment that I can grasp.

Your Honor is well aware of the ethnic background of at least my defendant, Gentile. Now I was under the impression we spent two months trying the prior case. Mr. Klein has labeled this as Elliot Ness, which is very appropriate. Now on Page 5 of this report there is the most ludicrous statement I have read in any report in 26 years, that the federal agents had observed that Mr. Gentile became noticeably more nervous since his close escape in the attempted shooting at the Neapolitan Noodle. The word on the street is that the Columbo members and associates blamed the Gallo faction for the shooting. Now before this they have the audacity or maybe the honesty to say that we admit that Mr. Gentile is not connected with any of the organized crime families. And yet they deliberately put before your Honor --

MR. BARLOW: Well, your Honor--

MR. SCHETTINO: -- let me finish, Mr. Barlow.

They put before your Honor the word Columbo, the word Gallo. He must have left out a few families. But if this isn't the dirtiest filthiest type of a

document -- you know the pound of flesh was gained here. Mr. Barlow got his conviction. We had a trial. I don't know whose report this is, whether Mr. Barlow is the author. But again I will close and say I will not accept this. I want an open hearing on it. And I want Mr. Barlow to testify. I want to know what happened with the tapes on that prior trial. In what manner were they inadvertently neglected to be sealed? How long has he been a prosecutor? And has this been the first time he inadvertently did this? And was this not a well-conceived and well planned act so information of this sort would be used in this dastardly manner.

One other question and I will stop. And again as I said at the beginning, Mr. Barlow has labeled it as a supplemental memorandum. I would like to now ask both the Court and Mr. Barlow have I examined every report that has been submitted to your Honor either by the Government or any other agency.

THE COURT: I don't know what you examined.

MR. BARLOW: I can answer that your Honor.

THE COURT: I don't know what you examined.

MR. SCHETTINO: I don't know how Mr. Barlow can answer at this point, I don't believe, because he doesn't know what was shown to me. But I would like the record to reflect that what I have seen to this

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King from the Inspection Service of IRS, with Agent Tsotsos of the INtelligence Division of IRS, and with Special Agent Lindly DeVecchi of the Federal Bureau of Investigation.

MR. KLEIN: May the record indicate that Mr. De Vecchi is the federal agent who was concerned in the surveillance of Mr. Gentile's house and whose voice appears on the wiretap in the other gambling case.

THE COURT: You may not have seen that (indicating).

No objection by the Government to that?

MR. BARLOW: No your Honor.

I might add, your Honor, I wasn't aware of that other memorandum until now. And I don't think the agents were either.

THE COURT: No, that is part of the probation report though. It is part of the probation report. I don't think it should be submitted that way unless it comes through the Government itself for some particular purpose and then I would respect it of course. This is no different from that which you have submitted.

MR. BARLOW: No your Honor.

THE COURT: But you received from Mr. Barlow --

not from Mr. Barlow but from the Probation -- the Department of Justice statement -- the letter from Mr. Haaren is amplification I think of that memo that I just turned over to you to look at.

MR. SCHETTINO: Well, I will accept that if the Court pleases, the statement that I have now examined any and all reports that have been submitted to your Honor in connection with the sentencing of the Defendant Gentile.

If it please, your Honor, can I once again insist upon a hearing on this report especially based upon --

THE COURT: Well you have been told already that the material that was submitted was taken from the tapes --

MR. BARLOW: No, your Honor, not from the tapes, from the informants and from the tapes in this case.

THE COURT: In this case?

MR. BARLOW: Yes sir.

THE COURT: What you submitted here was taken from the tapes in this case.

MR. BARLOW: The tapes in this case and the informants that were used in the gambling case. There is no information contained in the report that comes from the electronic surveillance, the contents of the

conversations in the gambling case.

MR. KLEIN: Your Honor, I think the best way to factually resolve this is to subpoena Mr. Dillon, Mr. Barlow and Miss Leggett --

THE COURT: No.

MR. KLEIN: -- and A, B, C and D --

THE COURT: I must disagree with you on the probation report, that that is not at all the proper method. You have a right, as I said before, to attack the probation report to show its inconsistencies, or the improprieties, or even the lack of it being accurate or inaccurate. But this is not one that is essential to requiring a hearing. If they said for instance that one of the defendant, by a long stretch of the imagination, had been in jail for 20 years for murder, that you would have a right to have a hearing on that because that goes to the very heart of the probation essentials as to his previous record, and so on and so forth. That would be a strict inaccuracy. But this at most is the same as the report that you submitted to the Court and have submitted to the Court, and I tell you it is a very excellent report. Both sides have attempted to influence the Court into giving what they feel would be a proper sentence under the circumstances. I do

not think a hearing would be proper under these circumstances. You may take issue with it and place it on the record and I will note your disagreement.

MR. KLEIN: I feel that the way it should be done is through a hearing where we can inquire into why the tapes were not sealed in the other case and to trace it --

THE COURT: I do not think that has a particular purpose in this case whatsoever. It is what happened in the other case. That may have been a proper hearing before Judge Bartels who dismissed the indictment. And maybe the motion should have been made at that time. But for this Court to go into that, a hearing in a plenary manner, I do not think I have a right to. I do not think that it would be proper nor would I be exercising my judgment in a proper fashion.

MR. KLEIN: Another point, your Honor, your Honor has just been handed this confidential memorandum,

THE COURT: Well, that is from probation. I don't think it should be confidential at all. It is right from Probation.

MR. KLEIN: Is there a copy or a similar one in Mr. La Ponzina's file, do you know, your Honor.

THE COURT: No, that comes in as a single sheet. There is one file on this as far as I know.

* * *

MR. KLEIN: No, sir. I say the discretion which the judges of the Eastern District have utilized is at the judges' discretion. It is not the descretion of the Probation Department to exclude from the eyes of defense counsel certain inflammatory matter which the judge knows about which is comparably buttressed by the recommendation and consistent with the recommendation but which deludes defense counsel into thinking he has a clean Probation Report when you get a confidential memorandum which is extracted. I want to know the authority for that. What right they have to do that except to fool defense counsel.

THE COURT: No, they have a right under the United States Code to submit the reports as they see fit and also submit a report that they deem confidential to the Court. They can do so. But it then becomes an exercise of the discretion of the Court as to whether or not he wants to submit it to the lawyer. In other words, they cannot prevent the judge from giving it to the lawyer.

MR. KLEIN: That is what I am saying, and because they put the confidential report in --

THE COURT: The judge can exercise discretion under certain standards.

MR. KLEIN: That is correct.

THE COURT: And that's the reason why you are permitted to attack it if you wish.

MR. KLEIN: I also wish to question him on whether there is any practice of signals between the prosecutor's office and the Probation Department as to whether or not the prosecutor desires a sentence in this case or desires no sentence, and that might be a reason for it.

THE COURT: That I wouldn't permit because this Court takes no information from anyone as to what sentence he should give out. The sentence is strictly within the discretion of what I give out. And it makes no difference what their practice is. I don't know it. And it is immaterial to me. It may be for themselves. But it has nothing to do with the Court exercising its discretion.

MR. SCHETTINO: Except, Judge, I think the record ought to reflect that by Mr. Barlow's own admission, he was the one that supplied to this probation lady the information wherein allegedly Mr. Gentile had this half million dollars or evidence of loan-sharking in his house. And she puts this in by way of parroting. The only thing she neglects to say is that Mr. Barlow told me this. And I must add that I agree with Mr. Klein and I join in it. I think

an inquiry as to the relationship between the Probation Department and the prosecutor is required.

THE COURT: That I will absolutely deny.

MR. KLEIN: May I respectfully request to be informed as to whether or not there is a similar confidential memorandum to Mr. La Ponzina?

THE COURT: That is both.

MR. KLEIN: That is for both?

THE COURT: Look at the top. You will see both.

MR. KLEIN: Well, we certainly object to this on the grounds that it is all hearsay.

THE COURT: Put it on the record.

MR. KLEIN: I am doing that now.

THE COURT: If you object to that piece of paper giving the date and what you say the inaccuracy is.

MR. KLEIN: The inaccuracy is it is strictly hearsay. And this statement by the Probation Department

"The agents indicate that they have evidence to verify the fact that the defendant -- " and they are speaking here of Mr. Gentile -- "has built a multi-million dollar gambling loan-sharking empire over a period of 15 or 20 years partially through the bribery of law enforcement officials . . ."

THE COURT: That doesn't say anything more than the last page that you pointed out to me, as far as I am concerned. The last page that you pointed out charges him with having $550,000 in outstanding loans and $15,000 in cash in various parts --

MR. KLEIN: But, Judge --

THE COURT: I do not know what was so confidential about it. It was right on the last page of the report.

MR. SCHETTINO: Except, Judge, now that you mention that last page, I most certainly object to that as being outlandish hearsay because, I do not know, maybe you will come into my house and you will find something and you will tell me about that -- they do not allude to what the evidence is. But they say that there is evidence that he is in involved in a multi-million dollar loan-sharking arrangement.

MR. KLEIN: We object to the rest of this too. But I want to make one statement --

THE COURT: It is now 5 after 1. Let's put it over until 2 o'clock.

MR. BARLOW: Your Honor, I have a schedule problem. I am due to go back on trial before Judge Bramwell at 2. It is possible because of his calendar

he may not be finished by 2 o'clock, but if he is --

THE COURT: No, this takes precedence over that trial.

MR. KLEIN: May I make this one statement because it will be disconnected when we come back at 2 o'clock.

THE COURT: It won't be disconnected.

MR. KLEIN: Somewhere along the line, I thought I saw the words "muscle-men" and "professiona criminal" which does not appear in this particular confidential memorandum in referring to Mr. La Ponzina. I am just wondering if there is a different one in Mr. Lan Ponzina's file perhaps.

THE COURT: I'm looking at all the papers I have here. Oh, here is Mr. La Ponzina. I'm sorry. You had better mark that. Let me just mark who it belongs to otherwise we will become confused. All right.

MR. KLRIN: Your Honor just handed me --

THE COURT: Mark it Gentile. Just put it across the top.

MR. SCHETTINO: It has "Gentile" on it.

THE COURT: Just put it on there so I can identify it with the papers.

MR. BARLOW: Your Honor, on the top of the

page it does refer to that.

MR. KLEIN: Your Honor, I have just been handed a similar confidential memorandum. This one is "Re: La Ponzina, Ernest." and here I respectfully object to the fact that the defendant is a "professional criminal" and "who is engaged in a multi-million dollar gambling and loan-sharking operation" and that he is a 'muscle-man' or that he participated in the profits of a gambling operation, and that he offered protection to Mr. Gentile. And we respectfully object to that. And without a hearing I don't know what else I can do unless we take testimony.

THE COURT: What we will do is -- is Miss Leggett in today?

MR. FENNELLY. I am not sure, your Honor, but I will check.

THE COURT: You will bring in the person that submitted that report. That's the next step.

MR. FENNELLY: Have her here at 2 o'clock, to you mean?

THE COURT: Yes.

(Thereupon, at 1:10 o'clock p.m., a recess was taken until 2.15 o'clock p.m.)

(Continued next page.)

* * *

THE COURT: Yes. Just advise her which part of the report you take issue with.

MR. KLEIN: I was going into the practice.

THE COURT: No, you are not going into the practice. If you take issue with any part of the report that she submitted, or some part of it, she will then answer you if she can as to how it got into her report. That is all you are allowed to do. There is nothing more.

MR. KLEIN: I respectfully except to the limitation.

THE COURT: Absolutely. The limitation could have been you couldn't have seen it at all. So there is no limitation. I have granted you the right that you are entitled to.

MR. KLEIN: Miss Leggett, do you want to take the stand, please.

THE COURT: No, she will stand right there. She doesn't have to raise her hand. She is an investigator.

MR. KLEIN: Well, it is an adversary hearing. Isn't she supposed to be sworn?

THE COURT: No, she is an investigator who has placed in the Probation Report which she signed certain statements. You may ask her as to the accuracy of

* * *

MISS LEGGETT: Yes, I did.

MR. KLEIN: And was that your own creation or was it dictated to you by your superior?

MISS LEGGETT: It was my own creation gone over by my superiors and approved by my superiors.

MR. KLEIN: Now, Miss Leggett, I show you this confidential memorandum -- it is labeled "CONFIDENTIAL MEMORANDUM", is that correct?

(Continued next page.)

MISS LEGGETT: Yes, that is correct.

MR. KLEIN: Whose idea was it to put "confidential memorandum" on that?

THE COURT: That's immaterial.

MR. KLEIN: All right.

THE COURT: It has nothing to do with it.

MR. KLEIN: Miss Leggett, your first sentence there states "Agents of the Internal Revenue Service's Intelligence Division advise that the defendant is a 'professional' criminal who is engaged in a multi-million dollar gambling and loan sharking operation with co-defendant Gentile. According to agents, evidence is available which indicates that Gentile ran the operation with protection offered by the defendant and his brother Ralph La Ponzina who were described as 'musclemen.' Reportedly Gentile divided the net profits equally between himself, the defendant and Ralph La Ponzina."

Did you say that?

MISS LEGGETT: Yes.

MR. KLEIN: Now, when you say "Agents of the Internal Revenue Service's Intelligence Division advise..." I presume --

THE COURT: No, don't presume.

MR. KLEIN: Did you have a conference with the agents of the Internal Revenue Service?

MISS LEGGETT: Yes, I did.

MR. KLEIN: Was it before the conviction in this case then or after?

MISS LEGGETT: After.

MR. KLEIN: After the conviction in the case. With whom did you speak to?

MISS LEGGETT: Agent King.

MR. KLEIN: And did Mr. King tell you that and --

THE COURT: No; did you receive that information from him? That is all you are entitled to and if she says yes --

MR. KLEIN: Did you receive that information from Mr. King?

MISS LEGGETT: Yes.

MR. KLEIN: And did you verify that or is this relying solely on Mr. King's statement?

MISS LEGGETT: Relying on Mr. King's statement.

MR. KLEIN: You ran no further check on it?

MISS LEGGETT: That is correct.

MR. KLEIN: Now, the next sentence, according to this, "...evidence is available which indicates that Gentile ran the operation with protection offered by the defendant and his brother Ralph

La Ponzina..." Is that also relying upon Mr. King's statement?

MISS LEGGETT: Yes. He assured me there was evidence to that effect.

MR. KLEIN: He told you that?

MISS LEGGETT: Yes.

MR. KLEIN: It is his words?

MISS LEGGETT: Yes.

MR. KLEIN: Have you met Mr. King before?

MISS LEGGETT: Not prior to this conference.

MR. KLEIN: This is the first time you met thi man?

MISS LEGGETT: Yes.

THE COURT: You can't question her about that. You can only ask her where she got the information. She told you where. So she has a foundation for it and that is what she puts in her report. You can disagree with it. But that is what she puts in the report.

All right.

MR. KLEIN: Did Mr. King describe Mr. LaPonzina and his brother Ralph, who passed away, as "Musclemen"?

MISS LEGGETT: Yes, sir.

MR. KLEIN: And you relied solely on Mr. King's statement to that effect?

MISS LEGGETT: Yes.

MR. KLEIN: In the next statement it says "Reportedly Gentile divided the net profit equally between himself, the defendant and Ralph LaPonzina." Now, when you say reportedly --

MISS LEGGETT: Mr. King's statement.

MR. KLEIN: That is the sole basis of this; is that correct?

MISS LEGGETT: Right.

MR. KLEIN: Your Honor, I would like to ask one more thing -- well, I will test it out. I think it is proper.

THE COURT: I don't know what you have in your mind.

MR. KLEIN: All right.

Let me ask this, did Mr. Gentile submit a statement to you in connection with this case?

MISS LEGGETT: I believe that he submitted a written statement to me. If you would like to see it perhaps I can go through my file and find it.

MR. KLEIN: Did Mr. Gentile in that statement state that the thousand dollars which he paid to Mr. Tsotsos was not a bribe but it was in payment of taxes?

MISS LEGGETT: I don't recall that statement.

MR. KLEIN: Did he in that statement state that Mr. La Ponzina was unaware of the fact that Mr. Gentile paid him a thousand dollars?

THE COURT: Mr. Klein, whatever his statement may have been to her she has in her report that the defendant maintained his innocence regarding the offense stated and knew nothing of the $1,000 bribe. And that Gentile -- Gentile she likewise reports -- she doesn't have to put down what their statements are. They need not be attached to the Probation report.

MR. KLEIN: I just want to know if an exculpatory statement was made by one defendant exculpating the other defendant, it should be in the other defendant's report.

THE COURT: She has placed in here what she felt were his statements. And this is what she reports to the Court. The defendant acknowledged he paid a $3,000 bribe on June 15, 1972 to the Internal Revenue Service agent. However, he stated he felt he had been entrapped by the agents. That is the very issue that went before the jury and the jury found him guilty.

MR. KLEIN: I am not speaking of that. I am speaking of the thousand dollars.

THE COURT: You can't question her on that. I will not permit it. Thatis not an inaccuracy.

* * *

May I stop there and ask you where you got the information?

MISS LEGGETT: If that refers to the arrest -- may I see it?

MR. SCHETTINO: Yes, surely. I am referring to page 20, Miss Leggett.

THE COURT: It is a summary (handing).

MISS LEGGETT: It may have been 1973 he was arrested by agents on a federal gambling charge --

MR. SCHETTINO: No. I have read the report, Miss Leggett. My uestion to you is where did you the information that there was evidence of $550,000 in loan sharking operations in the defendant's home? Who told you that?

MISS LEGGETT: That comes from the arrest of May of 1973.

Mr. Barlow advised me of this information.

MR. SCHETTINO: That was my question. Mr. Barlow told you?

MISS LEGGETT: He indicated that this was from public records.

MR. SCHETTINO: Did you go look at the public records?

MISS LEGGETT: No, I didn't.

MR. SCHETTINO: Did Mr. Barlow tell you that

these matters are a public record.

MISS LEGGETT: Yes.

MR. SCHETTINO: You got that statement from Mr. Barlow.

MISS LEGGETT: Yes.

THE COURT: That's all. It is not an inquisition. You are asking questions and she is answering them. That is all you are entitled to. Nothing more.

MR. KLEIN: Did he tell you which public record it was?

THE COURT: It doesn't make any difference. She has a basis for her statement in there. You are attacking inaccuracies in it, that is all.

MR. SCHETTINO: Well, Miss Leggett, when you say that a search of his home indicated that evidence was found you do not mean evidence, do you? You mean that Mr. Barlow told you this; is that correct?

MISS LEGGETT: Mr. Barlow did tell me this, that is correct.

MR. SCHETTINO: You didn't physically see the evidence?

MISS LEGGETT: I didn't physically see the evidence.

MR. SCHETTINO: To go on, Miss Leggett, you

further say, and $15,000 in cash hidden in various parts of the defendant's home -- now, when you interviewed the defendant did you ask about the cash that was found in his home?

MISS LEGGETT: No, I didn't.

MR. SCHETTINO: Isn't it a fact that you asked the defendant and he explained to you --

MISS LEGGETT: I did not.

THE COURT: You cannot do that. She has said she did not. You may argue to the Court in your plea for the sentence to be imposed upon the defendant but you can't argue with her.

MR. SCHETTINO: Your statement, Miss Leggett, is that you didn't inquire of the defendant regarding the cash that was located in his home?

MISS LEGGETT: Yes.

MR. SCHETTINO: The sentence that follows: An additional $4,600 in cash was found on the defendant's person.

In your interview with the defendant did you at any time inquire of him regarding that sum of money?

MISS LEGGETT: No, I didn't.

MR. KLEIN: Miss Leggett, did you receive a written communication from either Mr. King or Mr. Barlow a memorandum or a letter, or something confirming what

they told you?

MISS LEGGETT: No, I didn't.

MR. KLEIN: This was oral and in person?

MISS LEGGETT: In person.

MR. KLEIN: You and Mr. Barlow are housed in the same building here.

MISS LEGGETT: Not really. In close proximity.

THE COURT: She will deny that emphatically.

MR. KLEIN: No comment.

May the record indicate that --

THE COURT: I do not think there are any more questions.

MR. KLEIN: I just want to --

THE COURT: You have gone into the inaccuracies and she has answered them. It is up to the Court to determine from your argument with reference to your clients what must be done in this case. Now that's the end of it. There is no more.

MR. KLEIN: I am not asking any more questions. I am entitled to put something in the record.

THE COURT: All right, put something in the record.

MR. KLEIN: May the record indicate that Mr. La Ponzina's pre-sentence report is dated February 21, 1975 and the confidential memorandum to

Judge Costantino from the Probation Department in connection with Mr. LaPonzina is also dated February 21, 1975.

MR. SCHETTINO: Miss Leggett -- may I just ask you this final question -- other than information that was transmitted to you by Mr. Barlow or by Mr. King, does your report of February 6, 1975 and of January 24, 1975 contain a full and accurate report of all of the information that you garnered concerning the defendant Joseph Gentile?

MISS LEGGETT: Yes, sir.

MR. SCHETTINO: Independent of the information obtained by you from Mr. Barlow and Mr. King were there any other sources that you personally interviewed or any other evidence that you personally examined that would permit you to come to the conclusion in the last sentence of your report which reads:

"...based on this information the defendant appears to be heavily involved in illegal operations."

MISS LEGGETT: I have no other source other than the agent and Mr. Barlow.

THE COURT: All right, you may leave.

JUDGMENT (JOSEPH GENTILE).

United States District Court for

United States of America vs.

DEFENDANT: JOSEPH GENTILE — EASTERN DISTRICT OF NEW YORK

DOCKET NO. 72 CR 1232

JUDGMENT AND PROBABLE/COMMITMENT ORDER

AO 245 (10/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: 5 DAY: 30 YEAR: 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[ ] WITH COUNSEL John Schettino (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [XXX] GUILTY, in Counts 1,2,3 and 4

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C. Sec. 2, 201(b)(1)(2)(3), in that on or about June 14, 1972, June 15, 1972 and on or about and between June 14, 1972 and Aug. 9, 1972, both dates being approximate and inclusive, the defendant with another wilfully and knowingly, did combine, conspire, and agree to commit offenses against the U.S. and did corruptly, directly and indirectly give things of value to another, an employee of the U.S., acting for and on behalf thereof, in an official function, by authority of the I.R.S., with intent to influence said official's decision and action on matters pending before him, in his official capacity

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

4 years on each count to run concurrently and to pay a fine of $5,000.00. Execution of sentence is stayed pending appeal.

FILED IN CLERK'S OFFICE U.S. DISTRICT COURT E.D. N.Y. MAY 30 1975 TIME A.M. P.M.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[ ] U.S. District Judge

[ ] U.S. Magistrate

Marvin A. Steinberg

JUDGMENT (ERNEST LaPONZINA).

United States of America vs.

United States District Court for

DEFENDANT: ERNEST LA LONZINA | Eastern District of New York

DOCKET NO. ➤ 72 CR 1232

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date ➤ MONTH 5 DAY 30 YEAR 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Irwin Klein, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged

[XXX] GUILTY, in Counts 3 and 4

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C. Sec. 2, 201(b)(1)(2)(3), in that on or about and between June 14, 1972 and Aug. 9, 1972, both dates being approximate and inclusive, the defendant with another, did combine, conspire, confederate and agree to commit offense against the U.S. and did corruptly, directly and indirectly, offer and give things of value, to another, an employee of the U.S., acting for or on behalf thereof, in an official function, under and by the authority of the I.R.S., with intent to influence the said official's decision and action on a question and matter then pending before him in his official capacity

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

3 years and to serve 6 months in the New York Community Center - balance of 30 months on probation pursuant to T-18, U.S.Code, Sec. 3651. Execution of sentence stayed pending appeal.

SPECIAL CONDITIONS OF PROBATION

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
MAY 30 1975
TIME A.M.
P.M.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[ ] U.S. District Judge
[ ] U.S. Magistrate

Date 5/30/75

NOTICE OF APPEAL OF JOSEPH GENTILE.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

JOSEPH GENTILE,

Defendant-Appellant.

NOTICE OF APPEAL
72 Cr. 1232

Name and address of Defendant-Appellant: JOSEPH GENTILE
1662 65th Street
Brooklyn, New York

Name and address of Defendant-Appellant's Attorneys: IRWIN KLEIN, P.C.
2 Park Avenue
New York, New York 10016

Offense: Defendant-Appellant found guilty by a jury before Honorable Mark A. Costantino, Eastern District Judge, of three counts of violating 18 U.S.C. 2, 201 (b) (1) (2) (3), and one count of violating 18 U.S.C. 371.

Concise Statement of Judgement: Appellant sentenced on May 30, 1975 to a term of four (4) years on each count to run concurrently and to pay a fine of $5,000.00.

Defendant-Appellant's Current Status: Execution of sentence stayed pending appeal; defendant-appellant remains at liberty on bail.

NOTICE OF APPEAL OF JOSEPH GENTILE

Defendant-Appellant hereby appeals to the United States Court of Appeals for the Second Circuit from the within-stated judgment of conviction.

Dated: June 6, 1975

IRWIN KLEIN, P.C.

by _____
Attorneys for Defendant-
Appellant

NOTICE OF APPEAL OF ERNEST LaPONZINA.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

ERNEST LaPONZINA,

Defendant-Appellant.

NOTICE OF APPEAL
72 Cr. 1232

Name and address of Defendant-Appellant: ERNEST LaPONZINA
877 69th Street
Brooklyn, New York

Name and address of Defendant-Appellant's Attorneys: IRWIN KLEIN, P.C.
2 Park Avenue
New York, New York 10016

Offense: Defendant-Appellant found guilty by a jury before Honorable Mark A. Costantino, Eastern District Judge, of one count of violating 18 U.S.C. 2, 201 (b) (1) (2) (3), and one count of violating 18 U.S.C. 371.

Concise Statement or Judgment: Appellant sentenced on May 30, 1975 to a term of three (3) years, of which six (6) months are to be served in the New York Community Center and for the balance of thirty (30) months, defendant-appellant shall be placed on probation, pursuant to 18 U.S.C. 3651.

NOTICE OF APPEAL OF ERNEST LaPONZINA

Defendant-Appellant's Current Status: Execution of sentence stayed pending appeal; defendant-appellant remains at liberty on bail.

Defendant-Appellant hereby appeals to the United States Court of Appeals for the Second Circuit from the within-stated judgment of conviction.

Dated: June 6, 1975

IRWIN KLEIN, P.C.

by _____
Attorneys for Defendant-Appellant

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Attorney for

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OF NEW YORK